Pollock. A digest of the law of partnership. 1878.

A DIGEST

OF THE

LAW OF PARTNERSHIP.

BY

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INTRODUCTION.

The present work has been undertaken, in the first place, in order to supply the want—which, as I have good cause for believing, has for some time existed—of a concise work on the Law of Partnership, and, if this were all, it would be needless to say much by way of introduction. But the form I have adopted is not yet familiar enough to be used without some words of explanation; the adoption of it, moreover, commits the writer to certain opinions on matters of much wider range and importance than the subject actually handled. Those opinions are still far from being established, and one who attempts to exemplify them in practice is in some sort thereby bound to set forth his understanding of them, and to bear his part, however slight it may be, in their justification. My desire has been to follow, to the best of my power, the example set by Sir James Stephen, in his "Digest of the Law of Evidence," and now being repeated by him in the yet more weighty and difficult work of a

"Digest of the Criminal Law." This being said, it is almost superfluous to say that I agree with him in thinking the Indian Codes a desirable model for the exposition of English law, by authority if possible, but if and so far as that is too much to hope for, then by private endeavor; and that I likewise agree with the reasons which he has given for that opinion, both in the introduction to his "Digest of the Law of Evidence" and on various other occasions. Some of those reasons, however, I may, without presumption, try to restate in my own way, this being a topic on which repetition is certainly not vain in the sense of being needless; and it seems also proper, in addition to this general statement, to explain why the subject of Partnership appears to me a specially fit one for an experiment of this kind.

The method of stating the law in general propositions accompanied by specific illustrations was introduced into Indian legislation by Macaulay, though not brought into operation till many years afterwards, and to him the merit of the invention is chiefly, if not wholly, attributable.[1] It seems to

[1] Traces of the idea may be found in Bentham. He proposed to give in the body of a Code a running accompaniment of authoritative reasons and explanations, which might have dealt more or less in specific instances; and such instances do occur in the "Specimen of a Penal Code" (Works, vol. i.). But this amounts, at most, to a very vague foreshadowing of the Anglo-Indian method.

me the greatest specific advance that has been made in modern times in the art called by an ingenious writer "the mechanics of law-making." We should by no means underrate the gradual improvements of detail, the introduction of orderly arrangement, and cutting down of prolix and slovenly drafting, which have made recent Acts of Parliament comparatively readable; but Macaulay's invention stands on a different level. It is an instrument of new constructive power, enabling the legislator to combine the good points of statute-law and case-law, such as they have hitherto been, while avoiding almost all their respective drawbacks.

Case-law gives particular instances and concrete analogies, from which general rules may be inferred with more or less exactness, and their application to new instances predicted with more or less certainty; but it does not, strictly speaking, lay down general propositions beyond the limits which happen to be determined by the precise facts of each case. Every decided case does within those limits affirm a general proposition, with the help of the fixed understanding by which our Courts are governed, that similar decisions are to be given on similar facts. It involves, namely, the decision of all future cases

exactly like it, and also of all such as, though not exactly like it, may be in the opinion of the Court so nearly like it that they ought to follow its analogy. The investigation of the likeness or unlikeness of the facts of different cases for this purpose is often a matter of great difficulty and nicety, and the power of forming a judgment on such questions can be acquired only by legal training and experience. Thus the frame-work of case-law consists of the statement of a great number of sets of facts, together with the legal results which have been decided to follow from them; the generalities which make it possible to state the law in a connected form are supplied by a process of discussion, inference, and comment, carried on partly by the judges themselves in dealing with the cases, partly by private text-writers. But the inspection of such a work as Fisher's Digest will give in a very short time, even to a lay reader, a much better notion of the manner in which English case-law is constructed than can possibly be given by any description. In short, our English case-law, or any other system developed in substantially the same manner, has the great advantage of being full and detailed, and of preserving the memory of the remedies administered to the practical needs of men's

affairs in a record rich in experience and fruitful of suggestions. But there is no security for completeness, and imperfect security for consistency. While in some departments no possible scrap of mint or anise or cummin seems to remain unnoted, in others we may still wait for authority to give a certain answer on the greater matters of the law. We have decisions of the most elaborate minuteness on the construction of documents, and questions of substantive principle which are both important and elementary remain in an unsettled condition. And the system of graduated authority — an excellent one as far as it goes — which makes the decision of a Court of Appeal binding on all Courts below it, and the decision of the Court of final appeal binding on all other Courts and on itself,[1] does not prevent coördinate and conflicting decisions from standing side by side for an indefinite time.

[1] Even when a decision is affirmed on appeal by reason only of the House of Lords being equally divided, the decision remains binding on the House of Lords itself in subsequent cases. This happened in the case of *R.* v. *Millis*, 10 Cl & F. 534, which was afterwards expressly recognized as binding in *Beamish* v. *Beamish*, 9 H. L. C. 274 (see at p. 338); see, also, *Bright* v. *Hutton*, 3 H. L. C., at pp. 388, 391; *Attorney-General* v *Dean and Canons of Windsor*, 8 H. L. C. 369, 391. However even a Court of ultimate appeal may reconsider questions which the non-appearance of a respondent has formerly compelled it to determine *ex parte*. This has just been done by the Judicial Committee in the important ecclesiastical appeal known as the Folkestone Ritual case.

Case-law, moreover, is intelligible and accessible only to experts, and to them only with an expenditure of thought and labor often utterly disproportionate to the end in view.

Statute-law, on the other hand, gives general propositions in definite terms, but is seriously deficient in omitting to give particular instances, which in our present system are wholly left to be filled in afterwards by judicial decision, so far as occasions may present themselves. Nor is it to be supposed that this want exists only in the peculiar circumstances and habits of English or English-born jurisprudence, or is felt only by English lawyers. Such a supposition, if entertained at all, may be corrected by a moderate acquaintance with the Roman commentaries on the Edict which are partially preserved in the Digest, or, still better, the various modern editions and expositions of the French Codes. The closely-packed volumes of the "Codes Annotés" present us, in fact, with a French counterpart of Fisher's Digest; the chief points of contrast being that in the French work the decisions of the Courts and the opinions of text-writers, being of equal importance, are indiscriminately mixed up, and further that, inasmuch as neither decisions nor opinions (however highly esteemed) have

any binding authority, and the number of Courts of coördinate jurisdiction is far greater than with us, there is apparently no limit whatever to the amount of conflict that may arise. So that, whereas on simple questions the law of France is in general easier to be known than the law of England, yet on a complicated question, which for this purpose means any question on which experts may reasonably differ in their way of construing or supplementing the Code, the law of France must be, as it appears to me, almost infinitely more difficult to ascertain than the law of England, or, strictly speaking, not capable of being definitely ascertained at all. This state of things, it may be said, is in great measure due to carelessness and omissions on the part of the original framers of the Codes, want of subsequent revision, and other causes which the French legislators might and ought to have foreseen. And this, indeed, is the case; nevertheless I think that, on a comparison of the "Codes Annotés" with the Anglo-Indian Acts, it is impossible to resist the conclusion that, if the French Codes, the text being even as it now is, had been accompanied by a moderate number of authoritative illustrations, an immense amount of discussion and litigation would have been saved.

To come back nearer home, one is strongly tempted to consider how great improvements might have been effected in most of our Acts of Parliament, from the Statute of Frauds downwards, by a judicious use of the Anglo-Indian method. It would have diminished, at any rate, the risk of elaborate enactments almost fresh from the Queen's Printers being pronounced, when they came to be applied to existing facts, to be explicable on no other hypothesis than that they were intended to puzzle the Court of Queen's Bench; but this is a topic on which it is hardly safe to enlarge, lest one should unadvisedly speak of the wisdom of the Legislature more lightly than beseems an English citizen and servant of the law. This much, however, I may say, that the style peculiar to parliamentary drafting (though now to a great extent abandoned), which contrives with singular infelicity to be at the same time crabbed and nebulous, may be regarded as the natural fruit of English legal minds working in fetters, scrupulously anxious to cover all the cases which occurred to them, but debarred from distinctly pointing them out; having a specific meaning, but being forbidden to express it in a specific form.

The method of the Indian Codes escapes these

evils on both hands by combining the virtues of general enactments with those of specific decisions. The illustrations, being of equal authority with the text, serve as a commentary to fix its meaning and as a guide in its practical application. It is likewise, I think, a point of no small importance that by this system the function of case-law is distinctly recognized, and its results may be from time to time embodied in the law itself. In the successive revisions which, as Sir James Stephen has pointed out, are indispensable to keep a code in efficient working order, not only such defects as experience has shown to exist in the text may be amended, but cases decided since the last revision may be given as fresh illustrations if they are deemed important and instructive enough; or if, on the other hand, any decision has put on the text of the law a construction opposed to the intention of the Legislature, that construction may be expressly negatived in the same form. Here in England the absence of any such provision makes the statute-law yet more unwieldy and obscure than pure case-law, if not actually misleading. Lawyers know, of course, but I doubt if it is commonly known among laymen, that the Revised Statutes do not contain the whole law, nor anything like it, even on those subjects which Parlia-

ment has most expressly and, on the face of the Acts, exhaustively dealt with. The law regulating the form to be observed in the sale of more than £10 worth of goods is to be found, apparently, in the seventeenth section of the Statute of Frauds. But is it really there? Nothing of the kind; most of it is in the accumulated decisions of two centuries on that section, and if we wish to know the present state of things we must go to the text-writers, and thence, it may be, to the reports to which they refer us. So, even if we take much later instances, the law of publicans' licenses consists, not of the Licensing Acts, but of the Licensing Acts together with several decisions of the Court of Queen's Bench; the law which determines the qualifications of voters consists, not of the Reform Acts, but of the Reform Acts together with a great number of decisions of the Court of Common Pleas; and the law of civil procedure (to say nothing of the considerable parts which remain unchanged from the former practice without having been reënacted) is already contained, not in the Judicature Acts and Rules of Court, but in the Acts and Rules together with a good many decisions of the Court of Appeal and the several Divisions of the High Court. These instances, it may be said, or at all events the last of them, are instances of that

which is in any case unavoidable for a time; and this is true: but the mischief is that, instead of watching the process and gathering up or correcting its results, we let it run on without end, as if it were a part of the uncontrollable order of nature. It is as yet too early to revise the Rules of Court of 1875; but will they be revised ten, or twenty, or thirty years hence? Under our present arrangements it is impossible to say. If we paid any systematic attention to these matters, we should have a series of annual amending and supplemental Acts to bring the statutes of general public importance, and especially those with which laymen have most to do—such as Acts relating to public health, local government, and the like—into accordance with the real state of the law as settled by the cases decided upon them. This, which of itself would be an improvement of exceeding value, might be effected quite apart from any larger scheme of codification or consolidation; and it might also very well be done, though not so well, without the Anglo-Indian use of illustrations.[1]

[1] The plan of the New York Commissioners, which was to furnish the text of the Code with simple references to decided cases, seems to me only apt to perpetuate the inconveniences of existing statute-law. The law would still be contained, not in the Code, but in the Code and many other books.

Although I am strongly of opinion that the Anglo-Indian Codes furnish us, in their general method and design, with a pattern which we should do well to follow, it must not be supposed that I hold them to be perfect in execution. They are indeed far better than any other work of the kind that I have seen. It is hardly needful to mention the French Codes, which do not even aim at exactness of drafting, and are perhaps most fairly to be judged by regarding them as concise Institutes. The recently enacted Commercial and Penal Codes of Germany, of which, however, I cannot claim more than a superficial knowledge, are much nearer to what codes ought to be, and deserve, on many accounts, to be studied by English lawyers; still there is to English eyes, something unfinished about the workmanship, and in the Penal Code there is a great deal more of deliberate vagueness than we could now admit. The Italian Codes are modelled on the French, and therefore share their defects, though they have improved on them in details. One serious attempt has been made, elsewhere than in British India, to codify English law: I mean the draft Civil and Penal Codes of the State of New York, which were prepared and published several years ago, but remain unexecuted

projects. The draftsmen of the New York Penal Code had the Indian Penal Code before them; the framers of the Indian Contract Act, on the other hand, were able to consult the draft Civil Code of New York, and have made such use of it as they thought desirable. In this last case, at all events, no minute comparison is needed to show the great superiority of the Anglo-Indian work. For the rest, there can be no harm in saying freely that the New York Civil Code is, on the whole, not satisfactory, seeing that in its own birth-place it has failed to become law. The Indian Codes, then, are the best models yet produced; at the same time they are by no means faultless. It is easy to see various points in which they are capable of improvement, though it must be remembered that, for the purposes of Indian administration, labor and ingenuity would not improbably be thrown away in working them up to the refined exactness which is an English lawyer's ideal. The defects, however, so far from being inseparable from the method, are mostly due to a want of thoroughness in carrying it out in particular instances. Thus one find that statements of the law have been adopted, word for word, from English reports or text-books, which are open to verbal criticism, or

sometimes to more substantial objection; and it is occasionally difficult to see whether it was or was not intended to alter existing English law. This last difficulty may be a practical one even in India, and it would be very necessary to guard against it in any work of the same kind undertaken for England. Questions of the like sort have often enough, indeed, arisen in this country when there has been a series of similar statutes dealing with the same or similar topics in the same general manner, but with variations of language. In fine, I look upon the Indian Codes as exhibiting the type of what we should aim at by an example not to be merely copied, but to be followed and improved upon. If we could only determine that this should be done; if English people were once brought to perceive that this work is of national interest and importance, and its omission discreditable to our national intelligence, I believe it would be a quite practicable undertaking, and that within no unreasonable compass of time, to make the laws of England, or so much of them as concerns men's common affairs and duties, as good in form as they now are in substance, and as conspicuous an example of order and clearness as they now are of the contrary.

It is quite possible that exaggerated notions

may be entertained in some quarters of the benefits expected by the advocates of codification, and it is not impossible that some of the small number of persons who think codification worth working for do in fact expect too much from it. People who plead for giving a trial to an unfamiliar remedy are always in some danger of proclaiming their remedy as a panacea, and are pretty sure, in any case, to be accused of it. Now, there are evils of hardship, expense, and uncertainty which are due to the present form of the law, and which codification may abate, and has, in fact, abated in other countries, even under circumstances of disadvantage. But there are other drawbacks and difficulties, inherent in the very nature of legal affairs, which codification certainly cannot remove, although it may possibly mitigate them to some extent. Apart from all questions of form and procedure, the complexity and novelty of men's dealings will always give rise to a certain number of really difficult cases. And I do not see how those cases are to be prevented, under any system, from arising or from being difficult. Questions such as had to be decided in *Charter* v. *Charter*,[1] *Hollins* v. *Fowler*,[2]

[1] L. R. 7 H. L. 364.
[2] *Ib.* 757.

or *Robinson* v. *Mollett*,[1] must be hard to deal with, even if we had the best of possible codes. The skilled imagination of the draftsman who devises the illustrations may anticipate many future cases, but it cannot be all-exhaustive. There is no magic in the name or form of a code to make the legislator's foresight consummate. A good code, however, would do this: it would enable one to discover, with infinitely less trouble than at present, whether a given case were really difficult or not. Our present system has made easy cases difficult by throwing difficulties in the way of this preliminary enquiry. An English layman is, as a rule, helpless before the simplest legal question—he has to go to a lawyer to be told that it is simple. An English lawyer can see at once that some questions are simple; as to others he can generally make a fair guess, by a sort of trained instinct, whether there is anything serious in them, but he may have to spend a good deal of time in research before he can be sure even of this. And this kind of trouble and uncertainty, which often gives a factitious importance to matters that are small in themselves, would be vastly diminished, if not altogether removed, by any systematic arrangement of the law.

[1] L. R. 7 H. L. 802.

So, then, an objector may say, codification is to make easy cases easier, and leave the difficult ones as they are: but is that, after all, worth doing? Assuming, for argument's sake, that the objection may be fairly stated in this form, the reply is that easy cases are beyond comparison the more numerous in practice. The solid business of justice consists in giving effect to plain and settled rights, and the first thing to be secured is that such rights may be readily ascertained and speedily enforced. If this is thoroughly accomplished, the doubtful ones will almost take care of themselves. Men's attention is fixed on the one curious or difficult case — and this is true of the public as well as of lawyers and students — and they forget the ninety and nine which are straightforward, and where no doubt is possible after the facts are ascertained. The consideration here put forward will go far to explain why the French Codes, and codes framed in close imitation of them elsewhere, have, notwithstanding all their defects, been productive of great benefits in practice.

At the same time it is not altogether true that difficult cases would be left as they are, for a well-planned codification of any important branch of the law would remove many existing occasions of

difficulty. Questions which, in framing a code, it would be impossible to pass over are now unsettled, either because the point has not distinctly arisen, or, which is a commoner and more troublesome case, because it has arisen and has been evaded, thus becoming surrounded with uncertain and more or less conflicting *dicta*. Such questions would have to be dealt with and reduced to certainty one way or another, and a considerable amount of possible dispute would thus be cut short. To this extent, of course, codifying would involve substantive legislation; and for this reason I cannot agree with those who speak of codifying the law just as it stands. When one comes to think what it really means, the thing is seen to be impossible. There are parts of the law which, if codified as they stand, would be the laughing-stock of mankind; it is only the obscurity of their present form which enables them to exist at all. It seems to me a distinct advantage to be claimed for codification that it would drag into the light a number of petty anomalies and absurdities (and some, perhaps, that are not petty), and compel us to get rid of them. Parliament could not stultify itself by passing acts of which several sections declared the law to be doubtful, while others laid down things merely ludicrous. Con-

sider a few simple instances from the Law of Contract. How would the rule in *Pinnel's Case*[1] look in a code? It would run something like this: "The person entitled to the performance of a contract may . . . accept instead thereof any satisfaction he thinks fit: provided that he cannot accept in satisfaction of any sum of money the payment of any less sum, at the same time and place, and in the same manner, at and in which, respectively, the original sum was payable." That is, if A owes B £100, and B accepts £75 in money in satisfaction of the whole, at the same time and place at which the £100 are payable, A is not discharged from the remaining £25 without a release under seal; but if A gives and B accepts a pair of gloves or a peppercorn in satisfaction, the whole debt is discharged: and so the student would have to be told, I suppose, by means of illustrations. Could this possibly stand? The sale of goods, again, is one of the commonest transactions of life, and default in payment by the buyer is an event by no means unheard of. Yet nobody knows to this day what is the precise extent of an unpaid vendor's rights when he keeps or has resumed possession of the goods. Could Parliament be expected simply to put the doubt

[1] 5 Co. Rep. 117.

on record? Again, the vexed question of contracts made by correspondence — which is vexed only because it has been dealt with piecemeal and by many different authorities — could not be satisfactorily disposed of without an exercise of real legislative power. It would be only too easy to multiply examples. Any one who has had much to do with English law can probably call to mind some such curiosities in the subjects with which he is most familiar; in our criminal law there are several, mostly of statutory creation, which are truly amazing. An authentic codification, therefore, would involve amendment; and, if a codifying commission were appointed, it would be necessary to give power to the commissioners to suggest such changes as they should think indispensable. Ample opportunities should, of course, be given for the public explanation and discussion of proposed amendments, say, before a select committee; after which they might, if further security were thought desirable, be specially submitted to Parliament, and the commissioners might be directed by provisional and temporary Acts to embody them in the Code. This, however, is at best premature speculation. Meanwhile, statements of the law just as it is, in a codified form, may be good, not only for pres-

ent use, but to call distinct attention to the points where amendment is needed.

Another aspect of codification which deserves to be specially considered is its probable effect on text-books. I do not see any reason for thinking that it would make them superfluous; and I doubt if it would greatly diminish their extent. So far as one can guess from Continental and Anglo-Indian analogy, they would tend to assume the shape of commentaries on the Codes, or on considerable portions of them, and there would be fewer detached books on special subjects. This, it appears to me, would be a distinct gain to both writers and readers, for nothing is more troublesome to a lawyer, whether in reading or in writing, than the manner, at once wasteful and fragmentary, in which the field of legal study is covered by existing books. We have a number of treatises overlapping one another in all directions, and yet letting many things entirely, or almost entirely, fall through; so that a book like Williams' "Notes to Saunders' Reports," which is a collection of references and discussions on all sorts of topics strung together without even the pretence of arrangement, fulfils at present an important function, inasmuch as there is always some chance of finding things in it which other

books omit. Not abolition, but transformation of text-books would be the result of a code. There would still be plenty of room for exposition, and some, I doubt not, for discussion. A good deal of the space which is now perforce devoted to a laborious and often barren collection of authorities would be left free for rational explanation, and especially — though this hope may seem too sanguine — for a comparative and historical treatment which might be a powerful instrument of training in exact thought, and might raise the study of the law to something like its former rank as part of a liberal education. We might even cease to regard "jurisprudence" as a kind of mysterious knowledge, so hopelessly separated from the law of England as to require a distinct course of reading. Herein I do not wish for a moment to underrate the merits and utility of legal text-books of the present type; for which, having regard to existing conditions, one cannot be too thankful. In fact, it is only the text-writers who make our present state at all tolerable. So much is this the case that, if reports go on multiplying unchecked, the leading text-books will come to be freely cited as authority; there are already signs of a tendency that way, and it may be seen in a much more developed stage in

the United States. Thus we may find ourselves at no very distant time drifting into a condition much like that of Roman [1] and Continental jurisprudence, where authority had to be sought in a mass of mixed decisions and opinions of uncertain relative value. It would then remain to be seen whether even the most inflexible supporters of the beautiful flexibility of uncodified law might not choose codification as the lesser of two evils.

From this it would be natural to turn to the subject of reporting, which is one that needs to be considered in connection with the working of a code, and has, in fact, been under consideration in India. But the questions involved are too extensive to be dealt with here. There is a general feeling, I believe, that the present system is not satisfactory; and I may refer to Sir James Stephen's "Minute on the Administration of Justice in British India" (published by authority, Calcutta, 1872, pp. 39–46) for some reflections on this matter which may be no less pertinent for England.

The general topic of codification can hardly be dismissed without noticing one or two current delusions about it, for so I fear they must be

[1] *I. e.*, before Justinian.

called. One is that the French Codes will serve as a model for imitation, or as a representative case for criticism. Of this no more need be said than I have already had occasion to say in the foregoing pages. The principal lesson to be learnt from the French Codes is that even a very defective code is far better than none. Another belief which leads to a good deal of confusion, though it is of less practical importance, is that the work effected by Justinian's commissioners on the vast and unmanageable mass of Roman law was a codification in the modern sense. This belief is so strangely wide of the facts that one feels almost bound to produce specific evidence that it exists. It may be met with in several places where one is much surprised to find it. Only the other day a writer, whose general intentions were very just and laudable, but whose illustrations from Roman law showed more zeal than knowledge, observed, in the course of a paper advocating a Ministry of Justice, that Tribonian himself could not codify English law as it now stands. There is certainly no reason to suppose that he could, seeing that he did not in fact codify Roman law; nor can we assume that the idea of codification, as we now understand it, was ever present to his mind.

Again, the Introduction to the New York Civil Code speaks of the Code of Justinian (meaning, presumably, the whole *Corpus Juris*) as one of the greatest achievements of human genius. Surely the Commissioners must have unconsciously attributed the genius of the great Roman lawyers whose work is embodied in the Digest to the compilers, who so handled that work as to show themselves, in many places, incapable of understanding it. The real nature of Justinian's rearrangement of the law may be shown by an imaginary parallel. Let us suppose a Royal Commission charged to prepare an edition of Blackstone adapted to the existing state of the law, a Digest similar in plan to Fisher's (which, for this purpose, we may assume not to exist), but consisting wholly or chiefly of extracts taken bodily from the Reports, and not including modern Acts of Parliament, and a separate Digest arranged in the same manner and containing the substance of the Revised Statutes. The revised Blackstone would roughly correspond to the Institutes, which are a modernized edition of Gaius; and in like manner the Digest of case-law would correspond to the Pandects or Digest of Justinian, which are a compilation from the more or less authoritative treatises which

practically held a place analogous to that of reports in English jurisprudence, and the Digest of Statutes would correspond to Justinian's Code, which is a compilation of imperial rescripts and constitutions. The parallel holds, of course, only in outline; Gaius, for instance, is far superior to Blackstone as a legal writer, while on the other hand the arrangement of Fisher's Digest is beyond comparison more orderly and convenient than that of the Pandects or the Code. But the general resemblance is sufficient for the purpose of illustration. Now, let us further suppose that these three works, when complete, are annexed, by way of schedule or reference, to a Government Bill with an exceedingly pompous preamble, which in due course becomes an Act and confers on all of them the force of law. We must add that our imaginary Act would (still with much barbarous pomp of language) absolutely forbid, not only the citation of any earlier reports or text-books, but the publication of any commentary whatever on the new collection. It should be hardly needful to point out that such a proceeding would not be codification; and it is hardly possible to imagine either that anything of the kind should at this day be proposed, or that, if it were proposed, all persons having a moderate

acquaintance with law and legislation would not, with one accord, denounce it as too crude a project to be seriously entertained.

The foregoing remarks may be considered to apply, to a certain extent, to the setting forth of the law by private writers. The same advantages which are claimed for authentic codification should be to a certain extent attainable, if the claim is well founded, by the adoption of the same form in text-books. But the necessary deductions and qualifications, grave as they are, can easily be supplied, and I forbear to dwell on them. I will only call attention to Sir James Stephen's remark [1] that, whatever may be thought of the use of illustrations in a code, it is obviously desirable in an experimental application of the method by private hands, inasmuch as the reported cases given as illustrations are, if correctly stated by the writer, authoritative, whereas the general propositions of the text are not.

It remains to say something of the reasons and principles which have guided me in this particular work. The Law of Partnership is in many ways a specially convenient subject for the treatment here adopted. It has, in common with the Law of Evidence, the qualities of being of modern

[1] "Digest of the Law of Evidence," p. iv.

growth, homogeneous, and for the most part well settled. It is remarkably free from anomalies and technicalities, and has been singularly fortunate in the rational character of its development, by which it has earned an almost complete freedom from statutory interference. It has been otherwise with the Law of Companies, which I have left apart as now depending almost entirely on statute-law, and being in great measure already codified in the Companies Clauses Consolidation Act and the Companies Acts (besides other enactments affecting only special classes of companies), of which last, by the way, several sections are in urgent need of redrafting. It would be possible to prepare a consolidated edition of the Companies Acts, showing the effect of the decisions upon them by suggested modifications in the text; but the task would be a very laborious one, and almost certainly not worth the labor. The Law of Partnership proper, on the other hand, lies within a moderate and manageable compass. This assertion may seem strange to the reader accustomed to Mr. Justice Lindley's two goodly volumes. But it will be found that, after allowing for the parts of those volumes given to the Law of Companies, and for those which deal with topics bearing on the Law of Partnership in their

special applications, but not forming part of it, such as Agency, the remainder would be a book of no such great size. This brings me to another reason for choosing the form of a Digest, which presented itself to me with great force: I mean the extreme difficulty of writing a book in the ordinary form on the Law of Partnership which should in substance be otherwise than an abridgment of Mr. Justice Lindley's. As it is, his work has throughout been the guide and foundation of my own. Indeed, the existence of an accurate and exhaustive treatise on a larger scale is almost a condition precedent to such an undertaking as the present. But for this, the toil would be many times multiplied and the harvest precarious. I have everywhere given references to Mr. Justice Lindley's book, not merely by way of acknowledgment (a tribute which is at best imperfect), but also for other reasons. First, it is a necessary part of the plan of this work to give only a selection of authorities; and it seems well that a reader desiring fuller information should be enabled to put himself, with as small loss of time as may be, in the way of knowing everything that is to be known. Thus I have some hope that this book, in addition to whatever other uses it may have, will facilitate the stu-

and use of Mr. Justice Lindley's. Moreover I have in several places deliberately cited his book as my sole and sufficient authority. There are in most branches of the law, and especially in this, clear elementary propositions, never doubted and constantly acted upon, for which it is nevertheless hard to find any reported case exactly in point. There are others, again, for which no definite authority can be produced save a *Nisi Prius* case from Campbell or Peake. Now, it does seem to me that the twice-revised opinion of a living Judge, though technically not authority, is substantially worth at least as much as a summing up delivered at Westminster or Guildhall with little or no consideration, and at a time when the subject was in its infancy; and I have ventured to frame my references on this assumption. Where there is nothing to be gained by looking out a case in the book at large, it is surely desirable, if possible, to avoid citing it at all.

I have also made considerable use of the Indian Contract Act, the last chapter of which treats of Partnership, and has adopted, as it appears to me, all that is of solid value in the corresponding title of the New York Civil Code. This chapter, however, is by no means so full as other parts of the Act, and is somewhat unequal in execution;

and, owing to I know not what accident in the framing of it by the Indian Law Commission, there is an almost entire absence of illustrations. Any one who cares to make the comparison will see that I have thought it needful to go much more into detail. It will be understood that I am far from assuming to criticise the Indian Act on its own ground, since it is an open question whether the kind of completeness which Englishmen require in a statement of English law is necessary or desirable for Anglo-Indian purposes.

Following Sir James Stephen's example, I have aimed at fixing the limits of the subject-matter so as to exclude all merely collateral topics. Thus the capacity of persons to become partners is not different from their general capacity for contracting; that question, accordingly, is left aside as belonging to the general law of contract. In the same way the manner in which the existence of a partnership may be proved belongs to the law and practice of evidence; nor has it been expressly stated that no particular form is required for the contract of partnership, as the law of contract, in its modern shape, assumes throughout that no special form is needful where none is expressly prescribed. So, again, the general principles of agency are not entered upon, though

they are the foundation of the special rules which determine a partner's authority as agent of the firm. For the like reason nothing is said of fraud as a cause for rescinding the contract of partnership, the liability to rescission on this ground being one to which it is subject in common with all other contracts, and which, in this application, presents no peculiar features. In the third part of this Digest, entitled "Of Procedure and Administration," I have relaxed these limits on grounds of practical convenience, but have endeavored not to lose sight of them, and have abstained, for instance, from stating rules which are simply part of the general Law of Bankruptcy. The whole of the third part, however, may be regarded as supplemental and provisional. Elsewhere many readers may probably think I have included too little; my own impression (speaking, of course, with regard to the form and method here chosen) is that I have sometimes included too much. The full, discursive, exhaustive treatment of the subject, which is amply provided in the standard work already spoken of, would be out of place in a Digest. I have thought it desirable, however, to add a certain amount of brief commentary; and it seemed better to insert this matter in order as it was called for than to relegate

it to an appendix. The illustrations are taken from decided cases, with only one or two exceptions, and those of so simple a kind as to be obviously free from risk.

Lastly, I would express a hope which is bolder, perhaps, than any I have yet put forward. Sir James Stephen has said, and, as I believe, with perfect truth, that "the only thing which prevents the English people from seeing that law is really one of the most interesting and instructive studies in the world is that English lawyers have thrown it into a shape which can only be described as studiously repulsive." And this is not mere theoretical opinion; for, as he further tells us, Indian experience has actually shown "that when law is divested of all technicalities, stated in simple and natural language, and so arranged as to show the natural relation of the different parts of the subject, it becomes, not merely intelligible, but deeply interesting to educated men practically conversant with the subject-matter to which it relates." The subject-matter of the present work is one in which many important interests are involved, and with which many educated men are practically conversant. I have endeavored, so far as possible, to state the law in simple and natural language, to divest it of technicality, and to exhibit the dif-

ferent parts of the subject in their natural relation. It is, I trust, not irrational to hope that a work of this kind may be sufficiently intelligible, and to some extent interesting and useful, to men of business who are not lawyers. Bentham's saying notwithstanding,[1] I do not think it possible in a land of ancient and complex civilization to make every man his own lawyer; but I do believe it possible to put within every man's reach, not, indeed, a full knowledge, but a knowledge, clear, sound, and exact as far as it goes, of the laws he lives under and has to do with in his own daily business. If within its own limited sphere the present attempt shall fail to contribute anything towards that end, I am persuaded that the failure will be due, not to an aim beyond reason in the intention, but to my own shortcomings in the performance.

F. P.

5 New Square, Lincoln's Inn,
March, 1877.

[1] "Every man his own lawyer!—Behold in this the point to aim at."—Papers on Codification, No. viii. Letter 4.

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REFERENCES, ETC.

Lindley on Partnership (3d edition, 1873) is cited by the author's name alone.

The Indian Contract Act (IX of 1872) is cited by the abbreviation I. C. A.

I have sometimes referred to my own book on "Principles of Contract," for the fuller explanation of matters belonging to that general subject, rather than to the Law of Partnership.

Matters of practice and procedure which occur incidentally in the facts of the cases cited as Illustrations have been tacitly adapted to the present state of the law.

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DIGEST OF THE LAW OF PARTNERSHIP.

PART I.

THE CONTRACT OF PARTNERSHIP.

CHAPTER I.

WHO ARE PARTNERS.

ARTICLE 1.

Definition of Partnership.

Partnership is the relation which subsists between persons who have agreed to combine their property, labor, or skill in some business, and to share the profits thereof between them.[1]

This is the definition given by the Indian Contract Act. A number of others are collected from various English and other sources at the beginning of Mr. Justice Lindley's work. It is there said that most of them are, with reference to English law, too wide, as including corporation

[1] I. C. A. s. 239.

and joint-stock companies, which are not subject to the ordinary law of partnership. But it seems hardly satisfactory to say that the members of such bodies are not partners at all; for the analogy of partnership law does apply to them for some purposes, and those not unimportant ones — as, for instance, when questions arise as to the power of majorities to bind dissenting members. And, on the whole, it seems best to follow the example of the Indian Act, and, instead of excluding these associations from the category of partnerships, treat them as "extraordinary partnerships," regulated by special legislation.[1]

The nearest approach to a definition which has been given by judicial authority in England is the statement that, "to constitute a partnership, the parties must have agreed to carry on business and to share the profits in some way in common;"[2] where "profits" means the excess of returns over outlay. This principle at once excludes several kinds of transactions which, at first sight, have some appearance of partnership.

What is not Partnership — Common Ownership.

The common ownership of any property does not of itself create any partnership between the owners; moreover, there may be an agreement as to the management and use of the property, and the application of the produce or gains derived from it, without any partnership arising.[3]

[1] I. C. A. s. 266; see Art. 8, below.

[2] *Mollwo, March & Co.* v. *Court of Wards*, L. R. 4 P. C. at p. 436.

[3] Lindley, i. 26, 58; *French* v. *Styring*, 2 C. B. (N. S.) 357, 366. As to part owners of ships (the most common and important case), see Lindley, i. 67; Maude and Pollock on Merchant Shipping (3d Ed.), 72; Maclachlan on Merchant Shipping (2d Ed.), 90, 102; Smith Merc. Law (8th Ed.), 191; Kent Comm. iii. 154, 155; and Story on Partnership, ch. xvi. *passim*.

On the other hand, there may be a part ownership without partnership in the property itself, together with a real partnership in the business of managing it for the common benefit.[1]

Sharing Gross Returns.

The sharing of gross returns, with or without a common interest in property from which the returns come, does not of itself create any partnership. Thus, an agent paid by commission on his receipts is not thereby made a partner of his employers; and if the proprietor of a theatre lets it to a manager who finds the acting company, on the terms of the proprietor providing for the general service and expenses of the theatre, and the gross receipts being equally divided, the proprietor's share of receipts is merely a substitute for rent, and his taking it does not make him in any sense a partner with the manager.[2]

And, not only can there be no partnership without a sharing of profits, but it is now clear law, though formerly it was held otherwise, that in many cases there may be a sharing of profits, and yet no partnership.

ARTICLE 2.

Sharing Profits only Evidence of Partnership.

Subject to the special provisions hereinafter stated, the receipt of a share of profits, or of a payment contingent upon or varying with profits, is relevant, but not conclusive, to show the exist

[1] Per Cockburn, C. J., 2 C. B. (N. S.) 363; cp. *Cravsha Maule*, 1 Swanst. at p. 523; *Steward* v. *Blakeway*, 4 Ch. 603.
[2] Lindley, i. 26; *Lyon* v. *Knowles*, 3 B. & S. 556.

ence of a partnership. Whether a partnership does or does not exist in any particular case depends on the real intention and contract of the parties, as shown by the whole facts of the case.[1]

ILLUSTRATIONS.

Rule in Cox *v.* Hickman, *and later Applications.*

1. A trader is indebted to several creditors, and they enter into an arrangement with him by which the trade is to be conducted under their superintendence, and they are to be gradually paid off out of the profits. These creditors do not thereby become partners of the debtor in his trade, or liable for the debts of the concern; for "the real ground of the liability," where such liability exists, "is that the trade has been carried on by persons acting on his behalf;"[2] and, in the case of such an arrangement as this, the trade is not carried on by or on account of the creditors. The test of liability is not merely whether there is a participation of profits, but whether there is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business[3]

2. An underwriter, by his marriage settlement, assigns all the earnings of his business to trustees, upon trust, after payment of certain annuities to the trader himself and other persons, to accumulate the residue, subject to answer demands for losses, until the clear accumulated sum shall reach a certain amount, and then to hold the accumulated fund on the usual trusts for the benefit of the settler's wife and children, and to reassign the current earnings to the settler. This does

[1] *Mollwo, March & Co.* v. *Court of Wards*, L. R. 4 P. C. 419, 435.
[2] *Cox* v. *Hickman*, 8 H. L. C. 268, 306 (the leading case which put the law on its present footing).
[3] Lord Wensleydale in *Cox* v. *Hickman*, 8 H. L. C. at pp. 312, 313; Blackburn, J., in *Bullen* v. *Sharp* (Ex. Ch.), L. R. 1 C. P. at pp. 111, 112; Cleasby, B., *Ib.* at p. 118; and, further on, the effect of *Cox* v. *Hickman*, Bramwell, B., *Ib.* at p. 127, and Lindley, i. 44, 45.

not make the trustees partners in the underwriter's adventures.[1]

3. A partnership is entered into for a term certain, and it is provided by a clause in the articles that if a partner dies before the end of the term his representatives shall, during the rest of the term, receive the share of profits he would have been entitled to if living; a partner having died, his share of profits is paid from time to time to his executors, under this agreement. The executors do not thereby become partners.[2]

4. The business of an underwriter is conducted by A in the name of B, and A receives a fixed salary and one-fifth of the profits, subject, as to this one-fifth, to be wholly or partially refunded in the event of unexpected losses becoming known after the division of profits in any year. The contract between A and B is not one of partnership, but of hiring and service.[3]

5. A creditor, J, makes an agreement with his debtors, T and W, by which the sum due to him is to be paid out of the profits of a building speculation to be executed by T and W, J furnishing that part of the materials which belongs to his own trade; and, after payment of the debt, and paying for these new materials, the surplus is to belong to T and W. J does not become a partner of T and W, and is not liable for the price of goods ordered by them for the purpose of being used in the building.[4]

6. A, a publisher, agrees to publish, at his own expense, a book written by B, and to pay to B half the net profits, if any, as ascertained by a certain conventional method of taking accounts. It is doubtful whether this does or does not constitute a partnership between A and B;[5] but B is not liable to a

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[1] *Bullen* v. *Sharp* (Ex. Ch.), L. R. 1 C. P. 86.
[2] *Holme* v. *Hammond*, L. R. 7 Ex. 218.
[3] *Ross* v. *Parkyns*, 20 Eq. 331.
[4] *Kilshaw* v. *Jukes*, 3 B. & S. 847.
[5] In *Reade* v. *Bentley*, 4 K. & J. 656, Lord Hatherley, then V.-C. Wood, seems to have thought the "half-profits" contract did create a partnership. Mr. Justice Lindley (On Partnership, i. 22, note *t*) thinks otherwise. So did the Court in the Scotch case of *Venables* v. *Wood*, there cited by him (see ne note); but there, even if there had been a partnership, it w very difficult to make out that the debt sued for was a partn ship debt.

paper-maker for paper supplied to A for the purposes of A's publishing business, and used for printing B's book.[1]

The following special provisions were added in 1865, by the Act to amend the Law of Partnership (28 & 29 Vict. c. 86):

ARTICLE 3.

Act to amend Law of Partnership — As to Person advancing Money for Share of Profits.

"The advance of money, by way of loan, to a person engaged or about to engage in any trade or undertaking, upon a contract in writing[2] with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such."

ILLUSTRATIONS.

1. A, the proprietor of a music-hall, signs and gives to B, in consideration of an advance of £250, a paper in the following terms: "In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of copartnership to

[1] *Venables* v. *Wood*, 3 Ross, L. C. on Commercial Law, 529.

[2] That is, a contract showing on the face of it that the transaction is one not of partnership but of loan. *Syers* v. *Syers* 1 App. Ca. 174, per Lord Chelmsford.

you for one-eighth share in the profits of the O music-hall, to be drawn up under the Limited Partnership Act of 28 & 29 Vict. c. 86." This is not a contract for a share of profits within the Act, but constitutes a partnership at will, in which, as between A and B, B is to share profit without being liable for loss.[1]

2. B & Co. are traders in partnership. A lends money to the firm, on a contract in writing, under which the loan is to be repaid at the end of the partnership, and in the meantime A is to receive a certain share of profits, and is to be entitled to inspect the partnership books. This transaction is merely colorable as a loan, and is not within the Act, and A is liable as a partner for the debts of B & Co.[2]

ARTICLE 4,

As to Agent remunerated by Share of Profits.

"No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, nor give him the rights of a partner."

ARTICLE 5.

As to Widows or Children of deceased Partners receiving Share of Profits as Annuity.

"No person, being the widow or child of the deceased partner of a trader, and receiving by

[1] *Syers* v. *Syers*, 1 App. Ca. 174.
[2] *Pooley* v. *Driver*, W. N. 1876, 280.

way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of, or to be subject to any liabilities incurred by, such trader."

Article 6.

As to Seller of Good-Will receiving Share of Profits.

"No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of, or be subject to the liabilities of, the person carrying on such business."

Article 7.

Creditor receiving Share of Profits to be postponed to other Creditors for Value in case of Bankruptcy, etc.

"In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the

profits or interests payable in respect of such loan, nor shall any such vendor of a good-will as aforesaid be entitled to recover any such profits as aforesaid, until the claim of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied." [1]

Whether the Act adds to, Cox *v.* Hickman, *qu.*

It is by no means certain that this Act really adds anything material to what had already been decided in *Cox* v. *Hickman*.[2] But it is clear that its special provisions, even if to some extent superfluous, are not to be taken as in any way detracting from the generality of the principle laid down in that case.[3] It has been suggested that, whereas *Cox* v. *Hickman* [2] decides only that sharing profits is not *conclusive* evidence of partnership, and leaves it to be dealt with as a question of fact whether this is *sufficient* evidence in any case, the Act goes a step farther, and prevents it from being alone sufficient in any of the classes of cases dealt with.[4]

Exclusion of Creditor sharing Profits from competition with Others is absolute.

With regard to a creditor who has lent money in consideration of a share of profits, the Act excludes him absolutely, and according to its literal terms, from com-

[1] 28 & 29 Vict. c. 86, ss. 1-5. The word "person" in the Act includes a partnership firm, a joint-stock company, and a corporation: s. 6. See comments in Lindley, i. 46, 47.
[2] 8 H. L. C. 268.
[3] See *Holme* v. *Hammond*, L. R. 7 Ex. at pp. 227, 232.
[4] 1 Sm. L. C. (7th Ed.) 951.

peting with other creditors. It does not matter whether they were or were not creditors during the continuance of the loan. But if, during the same time, he has lent other sums at a fixed rate of interest, he may recover those sums, like any other creditor.[1] If it were sought to evade this prohibition, and make the Act an instrument of fraud, by advancing a small sum in consideration of a large share of profits, and a large sum at fixed interest, the lender would probably be treated as a partner.[2]

Article 8.

Limit to number of Partners in an ordinary Partnership.

An ordinary partnership may consist of any number of persons, not exceeding ten where the business of the partnership is banking, and not exceeding twenty where it is any other business.

A partnership consisting of any greater number of persons (hereinafter called an extraordinary partnership) must either be

a. Registered as a company under the Companies Act, 1862, or

b. Formed in pursuance of some other Act of Parliament or of letters patent, or

c. A company engaged in working mines within and subject to the jurisdiction of the Stannaries.[3]

Extraordinary partnerships are governed by

[1] *Ex parte Mills*, 8 Ch. 569.
[2] *Ib.* 574, 576.
[3] Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4.

the several statutes, instruments, laws, and customs which are specially applicable thereto respectively.

At common law there was no limit to the number of persons who might enter into partnership, and it is the better opinion[1] that there was nothing to prevent them from dividing the capital into transferrible shares and acting as a joint-stock company; but there were always great practical inconveniences about this. A partnership not complying with the conditions of the Companies Act is now illegal, and the members of such an association would be unable to enforce any claim arising out of the partnership dealings, although they would be individually liable for the debts of the concern to a creditor who had dealt with the firm without notice of the state of things making its business illegal.[2]

Associations carrying on that which at common law would be a partnership business, but exceeding the number of ten in the case of banking, and twenty in the case of any other business, and complying with the law by coming within one of the special categories laid down in the Companies Act, may be called extraordinary partnerships. They are governed by special rules of law, for the most part statutory, which we shall not here enter upon. The statutes, however, are to a considerable extent founded upon the principles of ordinary partnership law, so that they cannot be sufficiently understood without a knowledge of those principles.

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[1] Lindley, i. 201.

[2] See Lindley, i. 203–212. A creditor who has notice, *e. g.* a solicitor who has rendered professional services in forming and carrying on the association, knowing the number of members to exceed twenty, cannot recover. *Re S. Wales Atlant Steamship Co.*, 2 Ch. D. 763.

Of the kinds of extraordinary partnerships above specified, the class "*a*" are necessarily corporations, the association being made an artificial person, with rights and duties distinct from those of the natural persons who at any given time are members of it.[1]

The class "*b*" are generally, but not necessarily,[2] incorporated.

The class "*c*" are in no case incorporated, but are ordinary partnerships modified by local custom, and, since 1869, by statute also.[3]

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[1] See Lindley, i. 4, 213.

[2] By 7 Wm. 4 and 1 Vict. c. 73, the Crown may establish companies by letters patent, without incorporation.

[3] The Stannaries Act, 32 & 33 Vict. c. 19.

CHAPTER II.

OF THE FIRM.

ARTICLE 9.

The Firm.

"Persons who have entered into partnership with one another are called, collectively, a firm."[1]

ARTICLE 10.

Partners may adopt Firm-Name and use it in all Partnership Affairs.

The business of a firm may be carried on under any name, not distinctly purporting to be a corporate name, which the partners think fit to adopt for that purpose, subject to the condition mentioned in the next following Article.

The name so adopted is the name of the firm, and all acts done and instruments executed in that name by a partner or other person duly authorized thereto, are binding on all the partners.[2]

[1] I. C. A. s. 239.

[2] As to the authority of partners to bind the firm, see Ar 17-21, below.

Article 11.

Exclusive Right of Firm to Trade Name.

Where a particular name under which a business is carried on by any person, firm, or company has become associated with and appropriated to that business, no other person may carry on a like business under the same name, or a name only colorably differing therefrom, in a manner calculated to deceive customers by leading them to believe that they are dealing with such person, firm, or company as first mentioned.[1]

What Use of Names is lawful.

Generally speaking, every man is, by the law of England, free to call himself by what name he chooses, or by different names for different purposes,[2] so long as he does not use this liberty as the means of fraud or of interfering with other substantive rights of his fellow-citizens. And this extends to commercial transactions as well as to the other affairs of life: "Individuals may carry on business under any name and style they may choose to adopt."[3] The style of the firm need not, and often does not, express the

[1] See the authorities cited in the following notes. This Article is inserted here for convenience, though it obviously belongs, properly speaking, not to the law of partnership, but to that subdivision of the general law of ownership which has to do with copyright and other analogous rights.

[2] See the note in 3 Dav. Conv. pt. i. 357–362. Strictly speaking, this does not apply to names of baptism. The same or greater freedom existed in the Roman law, which allowed a change of *nomen*, *praenomen*, or *cognomen* alike. C. 9, 25, *de mutat. nom.* 1.

[3] Per Erle, C. J., *Maughan* v. *Sharpe*, 17 C. B. (N. S.) at p. 462.

name of any actual member of it. It may contain, and often does contain, other names, or no individual names at all. On the other hand, although no man is to be prevented from carrying on any lawful business in his own name by the mere fact of his name and business being like another's,[1] yet the mere fact of the name itself being his own does not give him any right or license to do so with such additions and in such a manner as to deceive the public, and make them believe they are dealing with some one else.[2]

Assumption of Corporate Name.

It is said to be an offence against the prerogative of the Crown for private persons to "assume to act as a corporation." But it is by no means clear how it can be punished (though possibly the Queen's Bench Division may have jurisdiction to punish it by fine).[3] And at all events the use of a description such as "Company," which by common usage is applicable to incorporated and unincorporated associations alike, does not amount to the offence in question.[4]

Foreign Laws as to Trade Names.

The laws of Continental states are much more strict and

[1] *Burgess* v. *Burgess*, 3 D. M. G. 896.
[2] *Holloway* v. *Holloway*, 13 Beav. 209.
[3] The attempt to establish a guild or "communa," without warrant, was formerly punishable by fine Madox, Hist. Ex. i. 562, gives several instances from 26 H. 2. Many of these "adulterine guilds," as they are called, in London and Middlesex; the burgesses of Totnes and of Bodmin; and Ailwin, the mercer and other townsmen of Gloucester, were amerced in considerable sums on this account. See Stubbs, Const. Hist. i. 418. It can hardly be said, however, that these bodies "assumed to act as corporations," in the modern technical sense.
[4] Lindley, i. 187.

definite as to the use of trade-names. In France, the style of a commercial firm (*raison sociale*) must contain no other names than those of actual partners.[1] In Germany, it must, upon the first constitution of the firm, contain the name of at least one actual partner, and must not contain the name of any one who is not a partner;[2] but, when the name of the firm is once established in conformity with these rules, it may be continued notwithstanding an assignment of the business, or changes in the persons who are partners for the time being, subject to certain consents being given.[3]

Exclusive Right to Trade Names analogous to Property in Trade-Mark.

But, "although in this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger," yet "the right to the exclusive use of a name in connection with a trade or business is familiar to our law."[4] This right is analogous to, but not indentical with, the right to a trade-mark proper. The right of the possessor of a trade-mark in the strict sense (which is now subject to statutory conditions under the Trade-Marks Registration Act, 1875, and the amending Act of 1876) is to prevent competitors from trading on his reputation, and passing off their wares as his own by means of copies or colorable imitations of the visible sign or device which he

[1] Code de Commerce, 21. For the French law as to the use of family names generally, see *Du Boulay* v. *Du Boulay*, L. R. 2 C. P. 430.
[2] Handelsgesetzbuch, 17.
[3] *Ib.* 23, 24.
[4] *Du Boulay* v. *Du Boulay*, L. R. 2 C. P. 430, 441.

has appropriated to his business; and the right of the possessor of a trade name stands on the like footing. "The principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."[1]

May be infringed by means of Trade-Marks, apart from infringement of Trade-Mark as such.

The right to a particular name may likewise be infringed circuitously, by means of a trade-mark fitted to bring goods into the market under a deceptive name. In such a case the first appropriator of the name has his remedy no less than if the name had been directly adopted by his rival, and it is no answer to his complaint to say that there is no such physical resemblance between the trade-marks as would deceive a customer of ordinary caution. The trade-mark complained of may be free from offence in its primary character and office as a visible symbol; but that will be no excuse for a breach of the distinct obligation to respect the trade names, as well as the trade marks, of other dealers.[2]

[1] Giffard, L. J., in *Lee* v. *Haley*, 5 Ch. at p. 161. The same principle has been acted on by the courts of France. Sirey, Codes Annotés, on Code de Commerce, 18, 19, no. 46 of note.

[2] *Seixo* v. *Provezende*, 1 Ch. 192. The leading authorities on this and the allied subject of trade-marks are collected in *Cope* v. *Evans*, 18 Eq. 138; see, too, the explanations and distinctions given in *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. at pp. 441 *seq.*, by Jessel, M. R., and S. C. in C. A. *Ib.* 451 *seq.*

Whether Action lies against Corporation for trading in its Corporate Name, where the Name itself is an Infringement of existing Trade Name.

Where a name of incorporation is such as to be, if used for trading purposes, an infringement of an existing trade name, it is doubtful whether an action can be maintained against the corporation for trading in its corporate name, or whether the only remedy is not against those persons individually who procured that name to be given.[1] But such an action, it is submitted, may well lie. For, though it may be true that the corporation has no power to trade under any other name than its proper name of incorporation, yet it is in no way bound to trade at all; and, if it has a name under which it cannot trade without interfering with other persons' rights, that is its misfortune, but can surely make no difference to their rights.

No Trade Name without actual Business.

There can be no trade name unless in connection with an existing business. A man cannot appropriate a name for this purpose by the mere announcement of his intention to trade under it.[2]

Firm not recognized as artificial Person — Otherwise in Scotland.

It may be proper to mention here that the law of England knows nothing of the firm as a body or artificial person distinct from the members composing it,[3] though the firm is so treated by the universal practice of mer-

[1] *Lawson* v. *Bank of London*, 18 C. B. 84
[2] *Ib.*
[3] Lindley, i. 213, 483.

chants and by the law of Scotland. In England, the firm name may be used in legal instruments, both by the partners themselves and by other persons, as a collective description of the persons who are partners in the firm at the time to which the description refers;[1] and, under the present Rules of the Supreme Court, actions may now be brought by and against partners in the name of their firm.[2] But an action between a partner and the firm, or between two firms having a common member, was impossible at common law, and probably remains so. In Scotland, on the other hand, the firm is a "separate person;" not only can it sue and be sued in the "social name," but it may sue and be sued by its own members, and firms having one or more members in common may sue each other.[3]

ARTICLE 12.

Guaranty for or to a Firm not binding, as to Events happening after a Change in the Constitution of the Firm, unless contrary Intention appears (Mercantile Law Amendment Act).

"*No promise to answer for the debt, default, or miscarriage of another, made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or a single per-*

[1] *Ib.* 215, 216.
[2] Order ix. r. 6, etc.; Arts. 63–67, below.
[3] Bell, Pr. of Law of Scotland, § 357; Second Report of the Mercantile Law Commission, 18, 141. Where the firm name is merely descriptive and impersonal, however, as "The Carron Iron Company," some of the members must be joined by name in the action.

son trading under the name of a firm, shall be binding on the person making such promise, in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding, notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise." [1]

This affirms Common Law.

This enactment of the Mercantile Law Amendment Act, 1856, is believed to have only affirmed the result of previous decisions.[2] The Indian Contract Act has a similar and more concisely worded provision (s. 260):

"A continuing guaranty, given either to a firm or to a third person, in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, such guaranty was given."

Evidence of Intention that Guaranty shall continue.

An intention that the promise shall continue to be binding, notwithstanding a change in the members of the firm, cannot be inferred from the mere fact that the primary

[1] 19 & 20 Vict c. 97, s. 4.
[2] *Backhouse* v. *Hall*, 6 B & S. 507, 520, per Blackburn, J.; 2 Wms.Saund. 821; Lindley, i. 225.

liability is an indefinitely continuing one; as, for example, where the guaranty is for the sums to become due on a current account.[1] Such intention may appear "by necessary implication from the nature of the firm," where the members of the firm are numerous and frequently changing, and credit is not given to them individually, as in the case of an unincorporated insurance society.[2]

[1] *Backhouse* v. *Hall*, supra.
[2] See *Metcalf* v. *Bruin*, 12 East, 400.

CHAPTER III.

OF PERSONS WHO ARE LIABLE AS PARTNERS.

ARTICLE 13.

Persons liable by "holding out."

"A person who has by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm."[1]

ARTICLE 14.

Whoever knowingly suffers himself to be represented as a partner in a particular firm is liable as such partner to any one who has, on the faith of such representation, given credit to the firm.[2]

This Rule a Branch of Estoppel.

"Where a man holds himself out as a partner, or allows others to do it, he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so act

[1] I. C. A. 245.
[2] Slightly altered from I. C. A. 246.

ing may be rightly held liable as a partner by estoppel."[1] The rule is, in fact, nothing else than a special application of the much wider principle of estoppel, which is that, if any man has induced another, whether by assertion or by conduct, to believe in and to act upon the existence of a particular state of facts, he cannot be heard, as against that other, to deny the truth of those facts.[2] It is therefore immaterial whether there is or is not in fact, or to the knowledge of the creditor, any sharing of profits. And it makes no difference even if the creditor knows of the existence of an agreement between the apparent partners that the party lending his name to the firm shall not have the rights or incur the liabilities of a partner. For his name, if lent upon a private indemnity as between the lender and borrower, is still lent for the very purpose of obtaining credit for the firm on the faith of his being responsible; and the duty of the other partners to indemnify him, so far from being inconsistent with his liability to third persons, is founded on it and assumes it as unqualified.[3]

What amounts to "holding out."

To constitute "holding out" there must be a real lending of the party's credit to the partnership. The use of a man's name without his knowledge cannot make him a partner by estoppel.[4] Also the use of his name must have been made known to the person who seeks to make him liable; otherwise there is no duty towards that

[1] Per Cur., *Mollwo, March & Co.* v. *Court of Wards*, L. R. 4 P. C. at p. 435.

[2] For fuller and more exact statements see *Carr* v. *London & Northwestern Railway Co.*, L. R. 10 C. P. at pp. 316, 317; Stephen Digest of the Law of Evidence, 105 (Art. 102).

[3] Lindley, i. 48.

[4] Lindley, i. 50; *Fox* v. *Clifton*, 6 Bing. 777, 496.

person.[1] There may be a "holding out" without any direct communication, by words or conduct, between the parties. One who makes an assertion intending it to be repeated and acted upon, or even under such circumstances that it is likely to be repeated and acted upon, by third persons, will be liable to those who afterwards hear of it and act upon it. "If the defendant informs A B that he is a partner in a commercial establishment, and A B informs the plaintiff, and the plaintiff, believing the defendant to be a member of the firm, supplies goods to them, the defendant is liable for the price." If the party is not named, or even if his name is refused, but at the same time such a description is given as sufficiently identifies the person, the result is the same as if his name had been given as a partner.[2]

Doctrine of "holding out" applies to administration in Bankruptcy.

The rule as to "holding out" extends to administration in bankruptcy. If two persons trade as partners, and buy goods on their credit as partners, and afterwards both become bankrupt, then, whatever the nature of the real agreement between themselves, the assets of the business must be administered as joint estate for the benefit of the creditors of the supposed firm.[3]

It does not apply to bind a Deceased Partner's Estate.

The doctrine of "holding out" does not extend to bind the estate of a deceased partner where, after his death, the business of the firm is continued in the old name; and

[1] *Ib.*; *Martyn* v *Gray*, 14 C. B. (N. S.) 824.
[2] Per Williams, J.; *Martyn* v. *Gray*, 14 C. B. (N. S.) at p. 841
[3] *Re Rowland and Crankshaw*, 1 Ch. 421.

whether creditors of the firm know of his death or not is immaterial. "The executor of the deceased incurs no liability by the continued use of the old name." [1]

Liability of Retired Partners.

A partner who has retired from the firm may be liable, on the principle of "holding out," for debts of the firm contracted afterwards, if he has omitted to give notice of his retirement to the creditors. But he cannot be thus liable to a creditor of the firm who did not know him to be a member while he was such in fact, and therefore cannot be supposed to have dealt with the firm on the faith of having his credit to look to.[2] This is the meaning of the saying that "a dormant partner may retire from a firm without giving notice to the world." [3]

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[1] Lindley, i. 52, 53, 418.
[2] *Carter* v. *Whalley*, 1 B. & Ad. 11.
[3] *Heath* v. *Sansom*, 4 B. & Ad. 172, 177; per Patteson, J. On the subjects of this and of the preceding paragraph, see further Art. 53, below.

CHAPTER IV.

OF THE LIABILITY OF PARTNERS FOR PARTNERSHIP DEBTS, AND THE AUTHORITY OF PARTNERS TO BIND THE FIRM.

ARTICLE 15.

Liability of Partners for Debts of Firm.

Every partner is liable jointly with the other partners, and in the case of mercantile contracts [at all events] is also severally liable for all debts and obligations incurred while he is a partner and in the usual course of the partnership business by or on behalf of the firm.[1]

The individual partner's liability for the dealings of the firm, whether he has himself taken an active part in them or not, is of the same nature as the liability of a principal for the acts of his agent, and is often treated as a species of it.[2] "Each individual partner constitutes the others his agents for the purpose of entering into all contracts for him within the scope of the partnership concern, and consequently is liable to the performance of all such con-

[1] Slightly altered from I. C. A. 249.
[2] See *Cox* v. *Hickman*, 8 H. L. C. at pp. 304, 312; Lindley, i. 379–382.

tracts in the same manner as if entered into personally by himself."[1]

The limitation of the liability to things done in the usual course of business will be presently spoken of under the correlative head of the partner's authority to bind the firm.

Whether joint or joint and several.

On the question whether the liability is joint only, or joint and several, it is stated by Mr. Justice Lindley that it is "in equity not only joint, but also several, except under special circumstances."[2]

The Master of the Rolls, in a recent case where the doctrine was considered, declined to affirm this except as to the contracts of mercantile partnerships, but did not contradict it.[3]

Article 16.

Liabilities of outgoing and incoming Partners.

A partner who retires from a firm, or the estate of a partner who dies, does not thereby cease to be liable for partnership debts contracted before his retirement or death,[4] and a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner;[5] but a retiring partner may be discharged

[1] Per Tindal, C. J.; *Fox* v. *Clifton*, 6 Bing. at p. 776.
[2] Lindley, i. 382.
[3] *Beresford* v. *Browning*, 20 Eq. 564, 573, 577; and see per James, L.J., S. C. in C. A. 1 Ch. D. 30, 34.
[4] Lindley, i. 451.
[5] Lindley, i. 494; I. C. A. 249.

from any existing liabilities, and an incoming partner may become subject thereto, by an agreement to that effect between the members of the new firm and the creditor.

Such agreement as last aforesaid may be either express or inferred as a fact from the course of dealing between the creditors and the new firm.[1]

ILLUSTRATIONS.

1. A, B, and C are partners. D is a creditor of the firm. A retires from the firm, and B and C, either alone or together with a new partner, E, take upon themselves the liabilities of the old firm. This alone does not affect D's right to obtain payment from A, B, and C, or A's liability to D.[2]

2. A partnership firm, consisting of A, B, and C, enters into a continuing contract with D, which is to run over a period of three years. After one year A retires from the firm, taking a covenant from B and C to indemnify him against all liabilities under the contract. D knows of A's retirement. A remains liable to D under the contract, and is bound by everything duly done under it by B and C after his retirement from the firm.[3]

3. A, B, and C are bankers in partnership. A dies, and B and C continue the business. D, E, and F, customers of the bank at the time of A's death, continue to deal with the bank in the usual way after they know of A's death. The firm afterwards becomes insolvent. A's estate remains liable to D, E, and F for the balances due to them respectively at the time of A's death, less any sum subsequently drawn out.[4]

In the case last put, one customer, D, discovers that securities held by the bank for him have been sold without his author-

[1] Lindley, i. 450–465.

[2] Lindley, i. 451.

[3] *Oakford* v. *European and American Steam Shipping Company*, 1 H. & M. 182, 191. See, also, *Swire* v. *Redman*, 1 Q. B. D. 536.

[4] *Devaynes* v. *Noble, Sleech's Case*, 1 Mer. 539, 569; *Clayton's Case*, *Ib.* 572, 604.

ity in A's lifetime. Here A's estate is not discharged from being liable to make good the loss, for the additional reason that D could not elect to discharge it from this particular liability before he knew of the wrongful sale.[1]

4. A and B are partners. F is a creditor of the firm. A and B take C into partnership. C brings in no capital. The assets and liabilities of the old firm are, by the consent of all the partners — but without any express provision in the new deed of partnership — transferred to and assumed by the new firm. The accounts are continued in the old books as if no change had taken place, and existing liabilities, including a portion of F 's debt, are paid indiscriminately out of the blended assets of the old and the new firm. F continues his dealings with the new firm on the same footing as with the old, knowing of the change, and treating the partners in the new firm as his debtors. The new firm of A, B, and C is liable to F.[2]

Test of Liability of new Firm.

To determine whether an incoming partner has become liable to an existing creditor of the firm, two questions have to be considered:

1st. Whether the new firm has assumed the liability to pay the debt.

2d. Whether the creditor has agreed to accept the new firm as his debtors, and to discharge the old partnership from its liability.[3]

Novation.

Novation is the technical name for the contract of substituted liability, which is, of course, not confined to cases of partnership. As between the incoming partner and the creditor, the consideration for the undertaking of the liability is the change of the creditor's existing rights.[4]

[1] *Clayton's Case*, *Ib.* 579.
[2] *Rolfe* v. *Flower*, L. R. 1 P. C. 27.
[3] *Ib.* at p. 38.
[4] See Lindley, i. 452.

Mere Agreement between Partners cannot operate as Novation.

An agreement between the old partners and the incoming partner, that he shall be liable for existing debts, will not of itself give the creditors of the firm any right against him, for it is a general rule that not even the express intention of the parties to a contract can enable a third person, for whose benefit it was made, to enforce it.[1] An incoming partner is liable, however, for new debts arising out of a continuing contract made by the firm before he joined it; as where the old firm had given a continuing order for the supply of a particular kind of goods.[2]

There is in law nothing to prevent a firm from stipulating with any creditor, from the beginning, that he shall look only to the members of the firm for the time being; the term *novation*, however, is not properly applicable to such a case.[3]

Article 17.

Power of Partner to bind the Firm.

Each partner who does any act necessary for, or usually done in, carrying on business of the kind carried on by the firm of which he is a member, binds his partners to the same extent as if he were their agent duly appointed for that purpose.[4]

[1] Pollock's Principles of Contract, 190.

[2] Lindley, i. 406.

[3] This is involved in *Hort's Case* and *Grain's Case*, 1 Ch D. 307, where the deed of settlement of an insurance company contained a power to transfer the business and liabilities, and a transfer made under that power was decided to be binding on the policy-holders. As to the misuse of the term *novation*, see per James, L. J., at p. 322.

[4] Slightly altered from I. C. A. 251; see Lindley, i. 248.

"Generally speaking, a partner has full authority to deal with the partnership property for partnership purposes." [1]

"Ordinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge, and integrity of every other partner. As between the partners and the outside world (whatever may be their private arrangements between themselves), each partner is the unlimited agent of every other in every matter connected with the partnership business, and which he represents as partnership business, and not being in its nature beyond the scope of the partnership." [2]

But not where he has neither apparent nor real Authority.

Exception. — The firm is [probably] not bound when a person who is in fact a member of it, but is not known to be so, and has, in fact, no authority to act for it, takes upon himself so to do.[3]

This exception is not established by any direct decision. But it was said in a recent case by Cleasby, B., that partnership does not always, and especially does not in these circumstances, imply mutual agency.

"In the common case of a partnership, where, by the terms of the partnership, all the capital is supplied by A, and the business is to be carried on by B and C in their own names, it being a stipulation in the contract that A shall not appear in the business or interfere in its management; that he shall neither buy nor sell, nor draw nor

[1] Lord Westbury in *Ex parte Darlington, etc., Banking Co.*, 4 D. J. S. 581, 595.
[2] James, L. J., in *Baird's Case*, 5 Ch. at p. 733.
[3] Lindley, i. 249.

accept bills; no one would say that, as among themselves, there was any agency of each one for the others. If, indeed, a mere dormant partner were known to be a partner, and the limitation of his authority were not known, he might be able to draw bills and give orders for goods which would bind his copartners, but in the ordinary case this would not be so, and he would not in the slightest degree be in the position of an agent for them." [1]

What kind of Acts in general bind the Firm.

The acts of a partner done in the name of a firm will not bind the firm merely because they are convenient, or prudent, or even necessary, for the particular occasion. The question is, what is necessary for the usual conduct of the partnership business; that is the limit of each partner's general authority; he is the general agent of the firm, but he is no more. "A power to do what is usual does not include a power to do what is unusual, however urgent." [2]

Whether a particular act is "necessary to the transaction of a business in the way in which it is usually carried on" is a question "to be determined by the nature of the business, and by the practice of persons engaged in it." [3] This must once have been in all cases, as it still would be in a new case, a question of fact. But, as to a certain number of frequent and important transactions, there are well understood usages extending to all trade partnerships, and now constantly recognized by the Court; these have become, in effect, rules of law, and it seems best to give them as such, and this we proceed to do.

[1] Cleasby, B.; *Holme* v. *Hammond*, L. R. 7 Ex. at p. 233.
[2] Lindley, i. 250.
[3] Lindley, i. 251.

ARTICLE 18.

Implied Authority of Partners in Trade as to certain Transactions.

Subject to the limitations expressed in the three next following Articles, every partner in a trading partnership may bind the firm by any of the following acts:

a. He may accept, make, and issue bills and other negotiable instruments in the name of the firm.

b. He may borrow money on the credit of the firm.

c. He may for that purpose pledge any goods or personal chattels belonging to the firm.

d. He may [probably] for the like purpose make an equitable mortgage, by deposit of deeds or otherwise, of real estate or chattels real belonging to the firm.

e. He may sell any goods or personal chattels of the firm.

f. He may purchase, on account of the firm, any goods of a kind necessary for, or usually employed in, the business carried on by it.

g. He may receive payment of debts due to the firm, and give receipts or releases for them.

The general powers of partners as agents of the firm

are summed up by Story in a passage which has been adopted by the Judicial Committee of the Privy Council:[1]

"Every partner is, in contemplation of law, the general and accredited agent of the partnership, or, as it is sometimes expressed, each partner is *praepositus negotiis societatis*, and may, consequently, bind all the other partners by his acts in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts on account of the partnership; he may draw, make, sign, endorse, accept, transfer, negotiate, and procure to be discounted promissory notes, bills of exchange, checks, and other negotiable paper in the name and on account of the partnership."

The particular transactions in which the power of a partner to bind the firm has been called in question, and either upheld or disallowed, are exhaustively considered by Mr. Justice Lindley (i. 277–313). A certain number of the leading heads may here be selected by way of illustration.

Authority to bind the Firm implied.

Negotiable Instruments.

The power of binding the firm by negotiable instruments is one of the most frequent and important.

Exceptions as to Directors of numerous Associations.

In trading partnerships every partner has this power,

[1] Story on Agency, § 124; *Bank of Australasia* v. *Breillat*, 6 Moo. P. C. at p. 193.

unless specially restrained by agreement.[1] In the case of a non-trading partnership, those who seek to hold the firm bound must prove that such a course of dealing is necessary or usual in the particular business. In case, again, of an association "too numerous to act in the way that an ordinary partnership does,"[2] whose affairs are under the exclusive management of a small number of its members — in other words, an unincorporated company — the presumption of authority does not exist either for this purpose or in the other cases where the partners have in general an implied authority; for the ordinary authority of a partner is founded on the mutual confidence involved, in ordinary cases, in the contract of partnership; and this confidence is excluded when the members of the association are personally unknown to one another.

In such a case those who are mere shareholders have no power at all to bind the rest, and the directors or managing members have no more than has been conferred on them expressly, or by necessary implication, in the constitution of the particular society.[3] But since the Companies Acts this rule is not likely to have much practical application.

It seems, indeed, a not untenable suggestion that the fixing of the number of twenty by the Companies Act, 1862, as the superior limit of an ordinary partnership, must be taken as a legislative declaration that no smaller number can be considered "too numerous to act in the way that an ordinary partnership does." The general

[1] Lindley, i. 280; *Bank of Australasia* v. *Breillat*, 6 Moo. P. C. at p. 194; *Ex parte Darlington, etc., Banking Co.*, 4 D. J. S. at p. 585.

[2] 3 D. M. G. 477.

[3] *Dickinson* v. *Valpy*, 10 B. & C. 128, and other authorities referred to in Lindley, i. 281; Pollock's Principles of Contract, 11

aim and policy of the Act, it might be urged, was to leave no middle term between an ordinary partnership and a company regularly formed under the Act. In point of fact, however, associations of seven or more persons who do not mean to act as partners in the ordinary sense will almost always seek to be registered as limited companies; and the question here started is, perhaps, merely curious.

Borrowing Money.

Every partner in a trading firm has an implied authority to borrow money for the purposes of the business on the credit of the firm.[1] The directors of a numerous association, according to the rule above explained, have no such authority beyond what may have been specially committed to them.[2]

Sale and pledge of Partnership Property.

Every partner has implied authority to dispose, either by way of sale or (where he has power to borrow on the credit of the firm) by way of pledge, of any part of the goods or personal property belonging to the partnership,[3] unless it is known to the lender or purchaser that it is the intention of the partner offering to dispose of partnership property to apply the proceeds to his own use, instead of accounting for them to the firm.[4]

A partner having power to borrow on the credit of the firm may probably give a valid equitable security, by deposit of deeds or otherwise, over any real estate of the partnership.[5]

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[1] *Bank of Australasia* v. *Breillat*, supra.
[2] *Burmester* v. *Norris*, 6 Ex. 796.
[3] Lindley, i. 301, 311.
[4] *Ex parte Bonbonus*, 8 Ves. 540.
[5] Lindley, i. 301.

But a legal conveyance, whether by way of mortgage or otherwise, of real estate or chattels real of the firm cannot be given except by all the partners, or with their express authority given by deed.[1]

Purchase.

A partner may buy on the credit of the firm any goods of a kind used in its business, and the firm will be bound, notwithstanding any subsequent misapplication of them by that partner.[2] This power extends to non-trading partnerships.[3]

Payment to and release by one Partner.

Payment to one partner is a good payment to the firm,[4] and by parity of reason a release by one partner binds the firm, "because, as a debtor may lawfully pay his debt to one of them, he ought also to be able to obtain a discharge upon payment."[5]

Authority to bind the Firm not implied.

Deeds.

One partner cannot bind the others by deed without express authority (which must itself be under seal),[6] and, where the partnership articles are under seal, the fact of their being so does not of itself confer any authority for this purpose.[7]

[1] Lindley, i. 301.
[2] *Bond* v. *Gibson*, 1 Camp. 185.
[3] Lindley, i. 307.
[4] Lindley, i. 288.
[5] Best, C. J.; *Stead* v. *Salt*, 3 Bing. at p. 103.
[6] *Steiglitz* v. *Egginton*, Holt, 141.
[7] *Harrison* v. *Jackson*, 7 T. R. 207.

Guaranties.

One partner cannot bind the others by giving a guaranty in the name of the firm, even if the act is in itself a reasonable and convenient one for effecting the purposes of the partnership business, unless such is the usage of that particular firm, or the general usage of other firms engaged in the like business;[1] in other words, there is no general implied authority for one partner to bind the firm by guaranty, but agreement may confer such authority as to a particular firm, or custom as to all firms engaged in a particular business. In the latter case, however, the force of the custom really depends on a presumed agreement among the partners that the business shall be conducted in the usual and customary manner.

Submission to Arbitration.

It is not competent to one member of a partnership to bind the firm by a submission to arbitration.[2]

ARTICLE 18 *a*.

Limited power of Managers in numerous Partnerships.

[Where the members of a partnership are too numerous to act as partners in the ordinary way, and it is provided by the constitution of the partnership that its affairs shall be conducted and controlled only by a limited number of its members (hereinafter called directors), then no members of the partnership, not being directors,

[1] *Brettel* v. *Williams*, 4 Ex. 623.
[2] *Stead* v. *Salt*, 3 Bing. 101.

can bind the others by their acts, and the directors can bind the others only within the scope of the authority conferred on them expressly, or by necessary implication, in the constitution of the partnership.[1]]

Apart from the Companies Acts, this is undoubted law; but, as above suggested, it is perhaps doubtful whether an association of this kind would now be recognized as differing in any respect from an ordinary partnership.

Article 19.

Partner using Credit of Firm for private Purposes.

Where one partner pledges the credit of the firm for a purpose apparently not connected with the partnership affairs, whether the transaction itself is or is not of a class within his apparent general authority, the firm is not bound, unless he is in fact specially authorized by the other partners [or, perhaps, unless the party dealing with him had reasonable ground for believing him to be so authorized].

The passage already partly cited from Story (Art. 18, p. 26, above) continues as follows:

"The restrictions of this implied authority of partr to bind the partnership are apparent from what already been stated. Each partner is an agent onl and for the business of the firm; and, therefore, his

[1] See Note 1, p. 28, above.

beyond that business will not bind the firm. Neither will his acts done in violation of his duty to the firm bind it when the other party to the transaction is cognizant of, or coöperates in, such breach of duty." [1]

Persons who "have notice or reason to believe that the thing done in the partnership name is done for the private purposes or on the separate account of the partner doing it," [2] cannot say that they were misled by his apparent general authority. For his authority presumably exists for the benefit and for the purposes of the firm — not for those of its individual members. The commonest case — indeed, the only case at all common — to which this principle has to be applied, is that of one partner giving negotiable instruments or other security, in the name of the firm, to raise money (to the knowledge of the person advancing it) for his private purposes, or for the satisfaction of his private debt.[3]

"The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who so took the security to remove by showing either that the partner from whom he received it acted under the authority of the rest, or, at least, that he himself had reason to believe so." [4]

"If a person lends money to a partner for purposes for

[1] Story on Agency, § 125; *Bank of Australasia* v. *Breillat*, 6 Moo. P. C. at p. 194.

[2] *Ex parte Darlington, etc., Banking Co.*, 4 D. J. S. at p. 585.

[3] See the cases referred to in the next note, and *Heilbut* v. *Nevill*, L. R. 4 C. P. 354, in Ex. Ch. 5 C. P. 478.

[4] Smith, Merc. Law, 45 (7th & 8th edd.), adopted by Keating and Byles, JJ., in *Leverson* v. *Lane*, 13 C. B. (N. S.) 278; by Lord Westbury in *Ex parte Darlington, etc., Banking Co.*, 4 D. J. S. at p. 585; and by Cockburn, C. J. (subject to a doubt as to the last words, see below), in *Kendal* v. *Wood* (Ex. Ch.), L. R. 6 Ex. at p. 248.

which he has no authority to borrow it on behalf of the partnership, the lender, having notice of that want of authority, cannot sue the firm."[1]

"When a separate creditor of one partner knows he has received money out of partnership funds, he must know at the same time that the partner so paying him is exceeding the authority implied in the partnership — that he is going beyond the scope of his agency; and express authority, therefore, is necessary from the other partner to warrant that payment."[2]

Whether the Creditor may be entitled as against the Firm by reasonable Belief in the Partner's Authority.

It is doubtful whether a separate creditor thus taking partnership securities or funds from one partner is justified even by having reasonable cause to believe in the existence of a special authority; the opinion has been expressed by Cockburn, C. J., that he deals with him altogether at his own peril.[3] But it may happen that the other partner whom the separate creditor seeks to bind has so conducted himself as to give reasonable ground for supposing there is authority; and, where he has done so, he may be bound on the general principle of estoppel. The rule is stated with this qualification or warning by Blackburn, J., and Montague Smith, J.[4]

Instance of the General Rule.

Another special application of the foregoing rule was made in a case where two out of three partners gave an acceptance in the name of the firm for a debt incurred be-

[1] *Bank of Australasia* v. *Breillat*, 6 Moo. P. C. at p. 196.
[2] Montague Smith, J., in *Kendal* v. *Wood*, L. R. 6 Ex. at p. 253
[3] L. R. 6 Ex. 248.
[4] L. R. 6 Ex. at pp. 251, 253.

fore the third had entered the partnership. This was held not to bind the new partner, for it was, in effect, the same thing as an attempt by a single partner to pledge the joint fund for his individual debts.[1]

Again, if a customer of a trading firm stipulates with one of the partners for a special advantage in the conduct of their business with him, for a consideration which is good as between himself and that partner, but of no value to the firm, the firm is not bound by this agreement, and incurs no obligation in respect of any business done in pursuance of it.[2]

The same principle applies to the rights of persons taking negotiable instruments endorsed in the name of the firm. Where a partner authorized to endorse bills in the partnership name and for partnership purposes endorses a bill in the name of the firm for his own private purposes, a holder who takes the bill, not knowing the endorsement to be for a purpose foreign to the partnership, can still recover against the other partners, notwithstanding the unauthorized character of the endorsement as between the partners;[3] but, if he knows that the endorsement is in fact not for a partnership purpose, he cannot recover.[4]

ARTICLE 20.

Effect of Notification that Firm will not be bound by Acts of Partner.

All or any of the partners in a firm may give notice that the firm will not be bound by acts, or

[1] *Shirreff* v. *Wilks*, 1 East, 48; see per Le Blanc, J.
[2] *Bignold* v. *Waterhouse*, 1 M. & S. 255.
[3] *Lewis* v. *Reilly*, 1 Q. B. 349.
[4] *Garland* v. *Jacomb* (Ex. Ch.), L. R. 8 Ex. 216.

by some class of acts, done in the name of the firm by any one or more of the partners; and, if such partner or partners as last aforesaid deal in the name of the firm, in any matter comprised in such notice, with any person to whose knowledge such notice has come, the firm is not bound thereby.

Restrictive Agreement inoperative if not notified.

It is clear law that, if partners agree between themselves that the apparent authority of one or more of them shall be restricted, such an agreement is inoperative against persons having no notice of it.

"Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. . . . Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons dealing with the firm without notice have no concern."[1]

Effect of Notice: semble *there must be a distinct* Warning.

There are *dicta* to the effect that a creditor who deals with a partner as agent of the firm, having notice of a restrictive stipulation among the partners themselves,

[1] Lord Cranworth; *Cox* v. *Hickman*, 8 H. L. C. at p. 304.

cannot hold the firm bound;[1] and this view is adopted in the Indian Contract Act, which enacts (s. 251, Exception) that—

"If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement."

But it is contested by Mr. Justice Lindley, who points out that an agreement between the partners that certain things shall not be done is quite consistent with an intention that, if they are done, the firm shall nevertheless be answerable. All that the agreement necessarily means is that the transgressing partner shall indemnify the firm, not that the firm shall not be liable. There should be, not merely a restriction of authority as between the partners, but a distinct warning to third persons dealing with the firm that if the forbidden acts are done the firm will not answer for them. If a partner tells a third person that he has ceased to be a partner, but his name is to continue in the firm for a certain time, this is not a disclaimer of responsibility, but means that he will be responsible for the debts of the firm contracted during the specified time;[2] and the cases seem closely parallel. The undoubted proposition that no agreement among partners, whether known or not to third persons, can avail to limit the amount of their liability for the debts of the firm, is also to some extent analogous.[3] The rule has been stated in

[1] *Lord Gallway* v. *Mathew*, 10 East, 264; *Alderson* v. *Pope*, 1 Camp. 404, *n.*
[2] *Brown* v. *Leonard*, 2 Chitty, 120.
[3] Lindley, i. 349.

the text above in a form intended to express Mr. Justice Lindley's opinion.

ARTICLE 21.

Admissions and Representations of Partners.

An admission made by one partner concerning the partnership affairs is relevant against the firm, and a representation made by one partner to any person concerning the partnership affairs has the same effect as against the firm, and so far as concerns the civil rights and liabilities of the partners, as if it had been made by all the partners.[1]

Explanation.—This does not apply to a representation made by one partner as to the extent of his own authority to bind the firm.[2]

An admission made by a partner, though relevant against the firm, is, of course, not conclusive;[3] for an admission is not conclusive against the person actually making it. A definition of the term *admission*, and references to authorities on this subject, will be found in Sir J. F. Stephen's Digest of the Law of Evidence, Art. 15. Representations, however, may be conclusive by way of estoppel, or under some of the rules of equity which are in truth akin to the legal doctrine of estoppel, and rest on the same principle.[4]

[1] *Wickham* v. *Wickham*, 2 K. & J. 478, 491.
[2] *Ex parte Agace*, 2 Cox, 312.
[3] *Stead* v. *Salt*, 3 Bing. at p. 103.
[4] Pollock's Principles of Contract, 478, 558, 561.

The limit of the rule above given by way of explanation is advisedly so given, as not being a real exception. Its necessity is obvious, for otherwise one partner could bind the firm to anything whatever by merely representing himself as authorized to do so.

CHAPTER V.

OF THE LIABILITY OF PARTNERS FOR WRONGS.

ARTICLE 22.

Liability of Partners for Wrongs.

Every partner is liable jointly with his fellow-partners [and also severally] for all sums and damages which the firm, while he is a partner therein, becomes liable for under either of the two next following Articles.

The cases in question are, as will immediately appear, those where a fraud or wrong is committed by one partner in the course of the business of the firm. There is no reason to doubt that in the case of a breach of trust, or wrong other than fraud, the liability is several as well as joint;[1] and it is difficult to see why it should be otherwise in the case of fraud. It has once been held that, in a suit to recover from one partner money which had been misapplied by another, all the partners were necessary parties;[2] but this appears to have been a solitary and unconsidered decision, and it has since been expressly dissented from.[3]

[1] Lindley, i. 315, 328.
[2] *Atkinson* v. *Mackreth*, 2 Eq. 570.
[3] *Plumer* v. *Gregory*, 18 Eq. 621, 627.

Article 23.

Fraud, etc., in conduct of Partnership Business.

Where loss or injury is caused to third persons, or penalties incurred, by the wrongful act or negligence of any partner acting in the ordinary course of the business of the firm, the firm is liable therefor to the same extent as the partner so acting.[1]

Article 24.

Misapplication of Money or Property received for or in Custody of the Firm.

Where any money or property of a third person is received by one partner, acting within the scope of his ordinary apparent authority in partnership affairs, and is misapplied by that partner,[2] and where any money or property of a third person, being as such in the custody of the firm, is misapplied by any partner,[3] the firm is liable to make good the loss.

Explanation. — Money is deemed to be in the custody of the firm when it has been paid to any agent of the firm, or paid or credited to the account of the firm with any person, in the ordinary course of business, or under such circum-

[1] Lindley, 1 315.
[2] *Blair* v. *Bromley*, 2 Ph. 354.
[3] *St. Aubyn* v. *Smart*, 3 Ch. 646; *Plumer* v. *Gregory*, 18 Eq. 621

stances that a partner using ordinary diligence in the partnership affairs would be aware of such payment or transaction.[1]

ILLUSTRATIONS.

1. A, B, and C are partners in a bank, C taking no active part in the business. D, a customer of the bank, deposits securities with the firm for safe custody, and these securities are sold by A and B without D's authority. The value of the securities is a partnership debt, for which the firm is liable to D.; and C, or his estate, is liable whether he knew of the sale or not.[2]

2. A and B are solicitors in partnership. C, a client of the firm, hands a sum of money to A, to be invested on a specific security. A never invests it, but applies it to his own use. B receives no part of the money, and knows nothing of the transaction. B is liable to make good the loss, since receiving money to be invested on specified securities is part of the ordinary business of solicitors.[3]

3. If, the other facts being as in the last illustration, C had given the money to A with general directions to invest it for him, B would not be liable, since it is no part of the ordinary business of solicitors to receive money to be invested at their discretion.[4]

4. J. and W. are in partnership as solicitors. P. pays £1,300 to J. and W., to be invested on a mortgage of specified real estate, and they jointly acknowledge the receipt of it for that purpose. Afterwards P. hands over £1,700 to W., on his representation that it will be invested on a mortgage of some real estate of F., another client of the firm, such estate not being specifically described. J. dies, and afterwards both these sums are fraudu-

[1] *Marsh* v. *Keating*, 2 Cl. & F. 250, 289. It may be doubted whether this explanation is really necessary. See note on this case, p. 51, below.

[2] *Devaynes* v. *Noble*, *Clayton's Case*, 1 Mer. at pp. 572, 579.

[3] *Blair* v. *Bromley*, 2 Ph. 354.

[4] *Harman* v. *Johnson*, 2 E. & B. 61.

lently applied to his own use by W. W. dies, having paid interest to P. on the two sums till within a short time before his death, and his estate is insolvent. J.'s estate is liable to make good to P. the £1,300, with interest from the date when interest was last paid by W., but not the £1,700.[1]

5. A and B, solicitors in partnership, have, by the direction of C, a client, invested money for him on a mortgage, and have from time to time received the interest for him. A receives the principal money without directions from C, and without the knowledge of B, and misapplies it. B is not liable, as it was no part of the firm's business to receive the principal money.[2]

6. A, one of the partners in a banking firm, advises B, a customer, to sell certain securities of B's which are in the custody of the bank, and to invest the proceeds in another security to be provided by A. B sells out by the agency of the bank in the usual way, and gives A a check for the money, which he receives and misapplies without the knowledge of the other partners. The firm is not liable to make good the loss to B, as it is not part of the ordinary business of bankers to receive money generally for investment.[3]

7. A customer of a banking firm buys stock through the agency of the firm, which is transferred to A, one of the partners, in pursuance of an arrangement between the partners, and with the customer's knowledge and assent, but not at his request. A sells out this stock without authority, and the proceeds are received by the firm. The firm is liable to make good the loss.[4]

8. A customer of a banking firm deposits with the firm a box containing securities. He afterwards authorizes one of the partners to take out some of these and replace them by certain others. That partner not only makes the changes he is authorized to make in the contents of the box, but proceeds to make other changes without authority, and converts the customer's securities to his own use. The firm is not liable to

[1] *Plumer* v. *Gregory*, 18 Eq. 621.
[2] *Sims* v. *Brutton*, 5 Ex. 802.
[3] *Bishop* v. *Countess of Jersey*, 2 Drew. 143.
[4] *Devaynes* v. *Noble, Baring's Case*, 1 Mer. at pp. 611, 614.

make good the loss, as the separate authority given to one partner by the customer shows that he elected to deal with that partner alone, and not as agent of the firm.[1]

9. A, one of the partners in a bank under the firm of M. & Co., forges a power of attorney from B, a customer of the bank, to himself and the other partners, and thereby procures a transfer of stock standing in B's name at the Bank of England. The proceeds of the stock are credited to M. & Co., in their pass-book with another bank, but there is no entry of the transaction in M. & Co.'s own books. The other partners in the firm of M. & Co. are liable to B, because it is part of the ordinary business of bankers "to sell, through their broker, stock belonging to their customers, and to receive and remit the proceeds" [and because they might, by the use of ordinary diligence, have known of the payment and from what source it came].[2]

10. W. and J. are solicitors in partnership. A, B, and C, clients of the firm, have left moneys, representing a fund in which they are interested, in the hands of the firm for investment. After some delay a mortgage made to W. alone is, with the consent of A, B, and C, appropriated as a security for this fund. W. realizes the security, and misapplies the money without the knowledge of J. The firm is not liable, as A, B, and C dealt with W., not as solicitor, but as trustee, and the breach of duty did not happen while the money was in the hands of the firm.[3]

Ground of Liability.

The general principle on which the firm is held to be liable in cases of this class may be expressed in more than one form. It may be put on the ground "that the firm

[1] *Ex parte Eyre*, 1 Ph. 227; cp. the remark of James, V.-C., 7 Eq. 516.

[2] *Marsh* v. *Keating*, 2 Cl. & F. 250, 289; see Mr. Justice Lindley's note, i. 327, from which the words in quotation marks are taken. If his comment is right, as it clearly is, one can hardly see what the knowledge, or means of knowledge, of the partners had to do with it; but the point is treated as material in the opinion of the judges. The truth is that the rule, as above given, by which the ordinary course of business is the primary test of the firm's liability, was developed only by later decisions.

[3] *Coomer* v. *Bromley*, 5 De G. & Sm. 532; and see a fuller account of the case in Lindley, i. 326.

has, in the ordinary course of its business, obtained possession of the property of other people, and has then parted with it without their authority;"[1] or the analogy to other cases where the act of one partner binds the firm may be brought out by saying that the firm is to make compensation for the wrong of the defaulting partner, because the other members "held him out to the world as a person for whom they were responsible."[2]

General Test on Principle of Agency.

The rule given in Art. 23 is in fact only a special case of the wider rule to the same effect which is one of the most familiar and important parts of the law of agency. The question is always whether the wrong-doer was acting as the agent of the firm and within the apparent scope of his agency. If the wrong is extraneous to the course of the partnership business, the other partners are no more liable than any other principal would be for the unauthorized act of his agent in a like case. The proposition that a principal is not liable for the wilful trespass or wrong of his agent[3] requires some extension and qualification; it should rather be that he is not liable if the agent goes out of his way to commit a wrong, whether with a wrongful intention or not. On the one hand, the principal may be liable for a manifest and wilful wrong if committed by the agent in the course of his employment, and for the purpose of serving the principal's interest in the matter in hand;[4] he is also liable for trespass committed by the agent under a mistake of fact such that, if the facts had been as the agent supposed, the act done would have been

[1] Lindley, i. 322.
[2] Per James, V.-C.; *Earl of Dundonald* v. *Masterman*, 7 Eq. at p. 517.
[3] Lindley, i. 315; Smith, Merc. Law (8th Ed.), 146.
[4] *Limpus* v. *General Omnibus Co.* (Ex. Ch.), 1 H. & C. 526.

not only lawful in itself, but within the scope of his lawful authority.[1] On the other hand, he is not liable for acts outside the agent's employment, though done in good faith and with a view to serve the principal's interest.[2]

Special Cases of Misapplication of Client's Money by one Partner.

Cases to which it has been sought, with or without success, to apply the principle stated in Art. 24 have generally arisen in the following manner: Some client of a firm of solicitors or bankers, reposing special confidence in one member of the firm, has intrusted him with money for investment; this has sometimes appeared in a regular course in the accounts of the firm, sometimes not. Then the money has been misapplied by the particular partner in question. When it is sought to charge the firm with making it good, it becomes important to determine whether the original transaction with the defaulting partner was in fact a partnership transaction, and, if it was so, whether the duty of the firm was not determined before the default. The illustrations above given will show better than any further comments of a general kind how these questions are dealt with in practice.

ARTICLE 25.

Improper Employment of Trust Moneys for Partnership Purposes.

If a partner, being a trustee, improperly em-

[1] *Bayley* v. *Manchester, etc., Railway Co.* (Ex. Ch.), L. R. 8 C. P. 148.

[2] *Poulton* v. *L. & S. W. R. Co.* L. R. 2 Q. B. 534; *Allen* v. *L. & S. W. R. Co.*, L. R. 6 Q. B. 65; *Bolinbroke* v. *Swindon Local Board*, L. R. 9 C. P. 575.

ploys trust moneys in the business or on the account of the partnership, no other partner is liable therefor to the person beneficially interested,[1] unless he either knew of the breach of trust, or with reasonable diligence might have known it.

In either of the last-mentioned cases the partners having such knowledge or means of knowledge as aforesaid are jointly and severally liable for the breach of trust.[2]

Liability of Partners for Breach of Trust by One not really a Partnership Liability.

This Article is inserted here for convenience, but does not properly belong to the law of partnership. For, since only those partners are liable who are personally implicated in the breach of trust by their own knowledge or culpable ignorance, it can hardly be said that the firm is liable, or that the individual partners are liable as partners. They are only joint wrong-doers, to whom the fact of their being in partnership has furnished an occasion of wrong-doing. The case is not really analogous to that of money being received in a usual course on the credit of the partnership and misapplied: as may be seen by putting the stronger case of all the partners robbing a customer in the shop, or cheating him in some matter unconnected with the business, and crediting the firm with the money

[1] We still want a convenient term of art to replace the harsh and cumbrous *cestui que trust*. *Trustor* was long ago suggested by Mr. Humphreys, and it is difficult to see why it has not found favor.

[2] Lindley, i. 328.

taken from him. Here it is obvious that the relation of partnership is not a material element in the resulting liability. Something will be said in another place, however (on Art. 61, below), of a special kind of claims against partners as trustees or executors of a deceased partner which have often raised difficult and complicated questions.

CHAPTER VI.

OF THE RELATIONS OF PARTNERS TO ONE ANOTHER.

ARTICLE 26.

Terms of Partnership may be varied only by Consent of all Partners.

Where the mutual rights and duties of partners have been determined by a special contract between them, such contract may be rescinded or varied by the consent of all the partners, but not otherwise.

Such consent may either be express or inferred from a uniform course of dealing.[1]

ILLUSTRATIONS.

1. It is agreed between partners that no one of them shall draw or accept bills in his own name without the concurrence of the others. Afterwards they habitually permit one of them to draw and accept bills in the name of the firm without such concurrence. This course of dealing shows a common consent to vary the terms of the original contract in that respect.[2]

[1] Slightly altered from I. C. A. 252; *Const* v. *Harris*, Turn. & R. 496, 517; Lindley, ii. 844.

[2] Lord Eldon in *Const* v. *Harris*, Turn. & R. at p. 523.

2. Articles of partnership provide that a valuation of the partnership property shall be made on the annual account day, for the purpose of settling the partnership accounts. The valuation is constantly made in a particular way for the space of many years, and acted upon by all the partners for the time being. The mode of valuation thus adopted cannot, after this course of dealing, be disputed by any partner or his representatives, though no particular mode of valuation is prescribed by the partnership articles, or even if the mode adopted is inconsistent with the terms of the articles.[1]

3. It is the practice of a firm, when debts are discovered to be bad, to debit them to the profit and loss account of the current year, without regard to the year in which they may have been reckoned as assets. A partner dies, and, after the accounts have been made up for the last year of his interest in the firm, it is discovered that some of the supposed assets of that year are bad. His executors are entitled to be paid the amount appearing to stand to his credit on the last account day, without any deduction for the subsequently discovered loss.[2]

Variations, when assented to, binding on Partner's Representatives.

It is an obvious corollary of the rule here set forth that persons claiming an interest in partnership property as representatives or assignees of any partner who has assented expressly or tacitly to a variation of the original terms of partnership are bound by his assent, and have no ground to complain of those terms having been departed from.[3]

ARTICLE 27.

Partnership Property.

The partners in any firm are owners in com-

[1] *Coventry* v. *Barclay*, 3 D. J. S. 320.
[2] *Ex parte Barber*, 5 Ch. 687.
[3] *Const* v. *Harris*, Turn. & R. at p. 524.

mon [or joint owners without benefit of survivorship?] of all property and valuable interests originally brought into the partnership stock, or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business. Such property and interests are called partnership property.[1]

Explanation.—The legal estate in land which is partnership property is held and devolves according to the general rules of the law of real property, but in trust, so far as necessary, for the persons beneficially interested in such land under this Article.[2]

Exception. — Where coöwners of an estate or interest in land, not being itself partnership property, are partners as to profits made by the use of such land, and purchase other land out of such profits, to be used in like manner, the land so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as coöwners.[3]

ILLUSTRATIONS.

1. Land bought in the name of one partner, and paid for by

[1] Altered from I. C. A. 253, sub-s. 1.
[2] Lindley, i. 685.
[3] See Illustration 6.

the firm or out of the profits of the partnership business,[1] is *prima facie* partnership property.[2]

2. One partner in a firm buys railway shares in his own name, and without the authority of the other partners, but with the money and on account of the firm. These shares are partnership property.[3]

3. The good-will of the business carried on by a firm, so far as it has a salable value, is partnership property.[3]

4. A and B take a lease of a colliery for the purpose of working it in partnership, and do so work it. The lease is partnership property.

5. A and B, being tenants in common of a colliery, begin to work it as partners. This does not make the colliery partnership property.[4]

6. If, in the case last stated, A and B purchase another colliery, and work it in partnership on the same terms as the first, the purchased colliery is not partnership property, but A and B are coöwners of it for the same shares and interests as they had in the old colliery.[5]

7. W., a nurseryman, devises the land on which his business is carried on and bequeaths the good-will of the business to his three sons as tenants in common in equal shares. After his death the sons continue to carry on the business on the land in partnership. The land so devised to them is partnership property.[6]

8. A is the owner of a cotton-mill. A, B, and C enter into partnership as cotton-spinners, and it is agreed that the business shall be carried on at this mill. A valuation of the mill, fixed plant, and machinery is made, and the ascertained value is entered in the partnership books as A's capital, and he is credited with interest upon it as such in the accounts. During

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[1] *Nerot* v *Burnand*, 4 Russ. 247, 2 Bli. (N. S.) 215.

[2] *Wedderburn* v. *Wedderburn*, 22 Beav. at p. 104; Lindley, i. 663–7. See more, as to good-will, in Chap. viii. below Art. 57.

[3] *Ex parte Hinds*, 3 De G. & Sm. 603.

[4] Lindley, i. 671, 673; *Crawshay* v. *Maule*, 1 Swanst. 495, 518, 523. *A fortiori*, where the colliery belongs to A alone before the partnership. *Burdon* v. *Barkus*, 4 D. F. J. 42.

[5] Implied in *Steward* v. *Blakeway*, 4 Ch. 603; though in that case it was treated as doubtful if there was a partnership at all.

[6] *Waterer* v. *Waterer*, 15 Eq. 402.

the partnership the mill is enlarged and improved, and other lands acquired and buildings erected for the same purposes, at the expense of the firm. The mill, plant, and machinery, as well as the lands afterwards purchased and the buildings thereon, are partnership property; and if, on a sale of the business, the purchase-money of the mill, plant, and machinery exceeds the value fixed at the commencement of the partnership, the excess is divisible as profits of the partnership business.[1]

ARTICLE 28.

Property bought with Partnership Money.

Unless a contrary intention appears, by express agreement or by the nature of the transaction, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

ILLUSTRATIONS.

1. L. and M. are partners. M., having contracted for the purchase of lands called the T. estate, asks L. to share in it, which he consents to do. The purchase money and the amount of a subsisting mortgage debt on the land are paid out of the partnership funds, and the land is conveyed to L. and M. in undivided moieties. An account is opened in the books of the firm, called "the T. estate account," in which the estate is debited with all payments made by the firm on account thereof, and credited with the receipts. The partners build each a dwelling-house at his own expense on parts of the land, but no agreement for a partition is entered into. The whole of the estate is partnership property.[2]

2. Land is bought with partnership money on account of one partner, and for his sole benefit, he becoming a debtor to the

[1] *Robinson* v. *Ashton*, 20 Eq. 25.
[2] *Ex parte McKenna* (*Bank of England Case*), 3 D. F. J. 645.

firm for the amount of the purchase money. This land is not partnership property.[1]

3. [One of two partners expends partnership moneys in buying a ship, which is registered in his name alone. The ship is not partnership property.[2]]

Description of Interest of Partners in Partnership Property.

It is not quite clear whether the interest of partners in the partnership property is more correctly described as a tenancy in common or a joint tenancy without benefit of survivorship, but the difference appears to be merely verbal.[3]

It will be observed that the acquisition of land for partnership purposes need not be an acquisition by purchase to make the land partnership property. Land coming to partners by descent or devise will equally be partnership property if, in the language of James, L. J., it is "substantially involved in the business."[4]

ARTICLE 29.

Conversion into Personal Estate for some Purposes of Land held as Partnership Property.

Where land has become partnership property, it is treated as between the partners (including

[1] 3 D. F. J. 659; *Smith* v. *Smith*, 5 Ves. 189.

[2] *Walton* v. *Butler*, 29 Beav. 428. This case, as reported, seems to go beyond the other authorities; but the facts are very briefly given, and there may have been circumstances which do not appear.

[3] Lindley, i. 680. It follows, in theory, that, if one partner's interest is forfeited to the Crown, the whole property of the firm is forfeited. *Ib.* 681; Blackst. Comm. ii. 409.

[4] 15 Eq. 406; see Illustration 7 to Art. 27.

the representatives of a deceased partner), and also as between the real and personal representatives of a deceased partner, as personal and not real estate, unless a contrary intention appears either by express agreement or by the conduct of the partners.[1]

This is really involved in the foregoing Article, but is of such importance as to call for a separate statement. The rule may now be taken as well settled, but has not been established without controversy. On this, however, it seems needless to dwell here. Ample materials for the critical and historical investigation of the subject will be found in Mr. Justice Lindley's work by the reader who desires to pursue it farther.

Article 30.

Conversion of joint into separate Estate, or, conversely, by Agreement of Partners.

Partners may at any time, by agreement between themselves, convert partnership property into the several property of any one or more of the partners, or the several property of any partner into partnership property.

Such conversion, if made in good faith, is effectual, not only as between the partners, but

[1] Lindley, i. 687–690 (on the balance of authorities, which see there collected); Kindersley, V.-C., *Darby* v. *Darby*, 3 Drew. 495, 506; and see 4 Ch. 609.

as against the creditors of the firm and of the several partners.[1]

Exception.—If the firm or the partner whose separate estate is concerned becomes bankrupt or is insolvent after any such agreement, and before it is completely executed, the property is not converted.[2]

ILLUSTRATIONS.

A and B dissolve a partnership which has subsisted between them, and A takes over the property and business of the late firm. A afterwards becomes bankrupt. The property taken over by A from the late partnership has become his separate estate, and the creditors of the firm cannot treat it as joint estate in the bankruptcy.[3]

ARTICLE 31.

What is a Partner's Share.

The share of a partner in the partnership property, at any given time, is the proportion of the then existing partnership assets to which he would be entitled if the whole were realized and converted into money, and after all the then existing debts and liabilities of the firm had been discharged.[4]

[1] Lindley, i. 674; *Campbell* v. *Mullett*, 2 Swanst. at pp. 575, 584.
[2] Lindley, i. 677; *Ex parte Kemptner*, 8 Eq. 286.
[3] *Ex parte Ruffin*, 6 Ves. 119; see, also, the Illustrations to Art. 75, below, where more complex cases are given. The question whether partnership property has been converted into separate property occurs in fact chiefly, if not exclusively, in the administration of insolvent partners' estates.
[4] Lindley, i. 681.

ILLUSTRATION.

F. and L. are partners and joint tenants of offices used by them for their business. F. dies, having made his will, containing the following bequest: "I bequeath all my share of the leasehold premises . . . in which my business is carried on . . . to my partner, L." Here, since the tenancy is joint at law, "my share" can mean only the interest in the property which F. had as a partner at the date of his death — namely, a right to a moiety, subject to the payment of the debts of the firm; and, if the debts of the firm exceed the assets, L. takes nothing by the bequest.[1]

Rules as to Relations of Partners in Absence of Special Agreement.

Unless any different agreement appears, the interest of partners in the partnership property, and their mutual rights and duties in relation to the partnership, are determined by the rules stated in the following Articles numbered thirty-two to thirty-nine, inclusive.

ARTICLE 32.

Presumed Equality of Shares.

Subject to the right of each partner to be credited in account with the firm with the amount of capital actually brought in by him, and with the amount of any indemnity he may be entitled to under the next following Article, the shares of

[1] *Farquhar* v. *Hadden*, 7 Ch. 1.

all the partners are presumed to be equal; and all the partners are entitled to share equally in the profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the partnership.[1]

ILLUSTRATION.

A and B, solicitors, carrying on business separately, are jointly retained to defend certain actions. This they do, conducting different parts of the business. Unless any different agreement is proved, the profits of the whole business are equally divisible between A and B.[2]

Form of the Rule as to Equality of Partners' Shares — Otherwise expressed in Indian Act.

The form in which the rule is here expressed is determined by the usual mode of keeping partnership accounts, in which the firm is treated as a fictitious person distinct from its members, and the capital brought in by each member is a debt due to him from the firm. In a mercantile view the debts of the firm to individual partners for capital and advances must be allowed for, as well as its debts to outside creditors, in order to ascertain the amount of its divisible property; and it is only to the available property of the firm as thus ascertained that the presumption of equal interest as between the partners applies. The Indian Contract Act (s. 253, sub-s. 1) gives the rule in a less artificial form:

"The share of each partner in the partnership property

[1] Lindley, i. 695, 821 *seq.*
[2] *Robinson* v. *Anderson*, 7 D. M. G. 239.

is the value of his original contribution, increased or diminished by his share of profit or loss."

It then goes on (sub-s. 2) to lay down the rule as to sharing profit and loss to the same effect as here given. This last rule is independent of the shares of capital originally contributed by the partners; and it is founded on the consideration that it is impossible for the Court to set a proportionate value on the services of each partner where there is no express agreement, since the worth of a particular member to the firm may depend on many things besides the amount of capital brought in by him.[1]

Article 33.

Right of Partner to Indemnity and Contribution.

Every partner is entitled to be indemnified in account with the firm for payments made and for personal liabilities incurred by him—

a. In the ordinary and proper conduct of the business of the firm;[2]

b. In or about anything necessarily done for the preservation of the business or property of the firm.[3]

This Right is independent of Agency.

Generally speaking, every partner is the agent of the firm for the conduct of its business (Articles 17–21, above),

[1] Lindley, i. 696.
[2] Lindley, i. 779 *seq.*, 801.
[3] *Ex parte Chippendale* (*German Mining Company's Case*), 4 D. M. G. 19; *Burdon* v. *Barkus*, 4 D. F. J. 42, 51.

and as such is entitled to indemnity on the ordinary principles of the law of agency. But the rights of a partner to contribution go beyond this: he may charge the firm with moneys necessarily expended by him for the preservation or continuance of the partnership concern.[1] This right must be carefully distinguished from the power of borrowing money on the credit of the firm, of which it is altogether independent.[2] It arises only where a partner has incurred expense which under the circumstances, and having regard to the nature of the business, was absolutely necessary, and the firm has had the benefit of such expense; as, where the advances are made to meet immediate debts of the firm (which is the most frequent case), or to pay the cost of operations without which the business cannot go on, such as sinking a new shaft when the original workings of a mine are exhausted.[3]

Interest allowed — Limit of Contribution may be fixed by Agreement.

Where the right to contribution is established, interest is allowed on the amount advanced at the rate of five per cent.[4] The total amount recoverable is not necessarily limited by the nominal capital of the partnership, for the expenditure on existing undertakings cannot be measured by the extent of the capital.[5] On the other hand, the limit of contribution may be fixed beforehand by express agreement among the members of a firm, and in that case

[1] *Ex parte Chippendale* (*German Mining Company's Case*), 4 D. M. G. 19; *Burdon* v. *Barkus*, 4 D. F. J. 42, 51.
[2] 4 D. M. G. 35, 40.
[3] *Burdon* v. *Barkus*, supra; *Ex parte Williamson*, 5 Ch. 309, 313; and the other cases cited in Lindley, i. 786, *n.*
[4] *Ex parte Chippendale*, 4 D. M. G. 36, 43; *Sargood's Claim*, 5 Eq. 43.
[5] *Ex parte Chippendale*, 4 D. M. G. at p. 42.

no partner can call upon the others to exceed it, however great may have been the amount of his own outlay on behalf of the firm.[1] This has nothing to do with the obligations of the partners to third persons, and accordingly does not affect the rule that "as to the rest of the world," unless the particular creditor has agreed to look only to some particular fund, "each partner is liable for the whole amount of the debts of the partnership."[2]

This duty imposed on the firm to indemnify any one of its members against extraordinary outlays for necessary purposes is one of a class of duties *quasi ex contractu* which are recognized by the law of England only very sparingly and under special circumstances. It is outside the rules of agency,[3] and has still less to do with trust; real analogies are to be found in salvage and average.

Article 34.

Right of Partner to take Part in Business.

"Each partner has a right to take part in the management of the partnership business."[4]

Although it is the rule, in the absence of special agreement, that "one partner cannot exclude another from an equal management of the concern,"[5] yet it is "perfectly competent," and in practice very common, "for partners to agree that the management of the partnership affairs shall be confided to one or more of their number exclu-

[1] *Worcester Corn Exchange Company*, 3 D. M. G. 180.
[2] Lindley, i. 389.
[3] The Lord Justice Turner, however, seems to assume an implied authority. 4 D. M. G. 40.
[4] I. C. A. 253, sub-s. 3.
[5] *Rowe* v. *Wood*, 2 Jac. & W. at p. 558.

sively of the others;"[1] and in that case the special agreement must be observed.

ARTICLE 35.

Duty of gratuitous Diligence in Partnership Business.

"Each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business."[2]

This rule, like the preceding, may be, and often is, departed from by express agreement. The second branch of it does not prevent a partner from recovering *compensation* for the extra trouble thrown upon him by a copartner who has disregarded the first branch by wilful inattention to business.[3]

ARTICLE 36.

Power of Majority to decide Differences.

Where differences arise as to matters in the ordinary course of the partnership business, they are to be decided by a majority of the partners;[4] but the decision must be arrived at in good faith for the interest of the firm as a whole, and not for the private interest of all or any of the majority,

[1] Lindley, i. 567.
[2] I. C. A. 253, sub-s. 4; Lindley, i. 794.
[3] *Airey* v. *Borham*, 29 Beav. 620.
[4] Verbally altered from I. C. A. 253, sub-s. 5.

and every partner must have an opportunity of being heard in the matter.

This rule extends to powers conferred on a majority of the partners by express agreement.[1]

Article 37.

Change in Nature of Business requires Consent of All.

No change can be made in the nature of the partnership business except with the consent of all the partners.[2]

This is one of the rules of partnership law which applies equally to companies; and in that application it is of great importance. "The governing body of a corporation that is in fact a trading partnership cannot, in general, use the funds of the community for any purpose other than those for which they were contributed."[3]

But it would not be relevant here to pursue this subject, on which the present writer has touched elsewhere.[4]

Article 38.

New Partner not admitted without Consent of All.

"No person can be introduced as a partner

[1] *Const* v. *Harris*, Turn. & R. 496, 518, 525; *Blisset* v. *Daniel*, 10 Ha. 493, 522, 527. See the section "Of the Powers of Majorities," Lindley, i. 618-630.

[2] *Natusch* v. *Irving*, Lindley, i. 622; *Const* v. *Harris*, Turn. & R. 517; I. C. A. 253, sub-s. 5.

[3] Wickens, V.-C., in *Pickering* v. *Stephenson*, 14 Eq. 322, 340.

[4] Pollock's Principles of Contract, 90, 104.

without the consent of all those who for the time being are members of the firm."[1]

Assignment of Share of Profits.

This is given by Mr. Justice Lindley as "one of the fundamental principles of partnership law." The reason of it is that the contract of partnership is presumed to be founded on personal confidence between the partners, and therefore not to admit of its rights and duties being transferred, as a matter of course, to representatives or assignees. A partner can, indeed, assign or mortgage to a stranger his interest in the profits of the firm; and the assignee or mortgagee will thereby acquire "a right to payment of what, upon taking the accounts of the partnership, may be due to the assignor or mortgagor."[2] It is at least doubtful whether he can call on the other partners to account with him, and his claim is subject to all their existing rights.[3]

"If the partnership is at will, the assignment dissolves it; and if the partnership is not at will, the other members are entitled to treat the assignment as a cause of dissolution."[2]

Sub-Partnership.

An unauthorized attempt by one partner to admit a new member into the firm, otherwise than by assignment of his share, would have, at most, the effect of creating a *sub-partnership* between himself and the new person; that is, there would be as between themselves a partnership

[1] Lindley, i. 717; almost in the same words is I. C. A. 253, sub-s. 6.
[2] Lindley, i. 718, 719.
[3] *Kelly* v. *Hutton*, 3 Ch. 703.

in his share of the profits of the original firm. But as against the original firm itself the new-comer would have no rights whatever.[1] "*Cum enim societas consensu contrahatur, socius mihi esse non potest, quem ego socium esse nolui. Quid ergo si socius meus eum admisit? ei soli socius est. Nam socii mei socius meus socius non est.*"[2]

Shares transferrible by Agreement.

On the other hand, the interest of all or any of the partners may be made assignable or transmissible by express agreement; and such agreement may be embodied, once for all, in the original constitution of the partnership.[3]

ARTICLE 39.

Custody and Inspection of Partnership Books.

The partnership books must be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner is entitled to have access to them, and to inspect and transcribe the same, or any of them, when he may think proper.[4]

It must be observed that this rule, like the foregoing ones from Art. 32 onwards, is subject to any special agreement that may be made between the partners.

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[1] Lindley, i. 55; *Brown* v. *De Tastet*, Jac. 284.
[2] Ulpian, D. 17, 2; *pro socio*, 19, 20.
[3] Lindley, i. 719.
[4] *Greatrex* v. *Greatrex*, 1 De G. & Sm. 692, see the terms of the order there; Lindley, i. 828. Where a firm has more than one place of business, it should always be expressly provided by the partnership articles which shall be considered the principal place of business and where the books are to be kept.

Article 40.

Partner cannot be expelled unless under express Power.

No majority of the partners can expel any partner, unless a power to do so has been conferred by express agreement between the partners.

Where such power is conferred, it must be exercised only in good faith with a view to the benefit of the firm,[1] and the partner whom it is sought to expel must have an opportunity of being heard.[2]

Effect of attempted irregular Expulsion.

If it is attempted to expel a partner contrary to this rule — as, for instance, without hearing him — the attempted expulsion is merely void. The party does not cease to be a partner, and therefore sustains no loss in contemplation of law, and has no cause of action for damages:[3] his remedy is to claim reinstatement in his rights as a partner, which he can effectually do.[4]

It is difficult to say how the Court would treat a clause expressly giving power to expel a partner not only without assigning specific reasons, but without hearing him. There can be little doubt that at one time it would have been held void. At the present day it seems more likely that

[1] Compare Art. 35, above; *Blisset* v. *Daniel*, 10 Ha. 493.
[2] *Wood* v. *Wood*, L. R. 9 Ex. 190; Lindley, ii. 870.
[3] *Wood* v. *Wood*, last note.
[4] *Blisset* v. *Daniel*, 10 Ha. 493.

effect would be given to it, if such appeared to be the real intention of the parties; but at any rate the clearest and most express words would be required to show such an intention.

ARTICLE 41.

Retirement from Partnership for a Term only by Consent.

Where a partnership has been entered into for a fixed term, no partner can retire from it during such term, except with the consent of all the partners, or in the exercise of an option previously conferred by express agreement.[1]

ARTICLE 42.

Retirement from Partnership at Will.

Where no fixed term has been agreed upon for the duration of the partnership, any partner may retire from it at any time, upon giving express notice of his intention so to do to all the other partners.

Where the partnership was originally constituted by deed, it is doubtful whether such notice must be under seal.[2]

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[1] I. C. A. 253, sub-s. 9 (slightly altered); Lindley, i. 757.
[2] Lindley, i. 232, 233; *Crawshay* v. *Maule*, 1 Swanst. at p. 508. See, further, as to this, Art. 47, below.

ARTICLE 43.

Where Partnership for Term is continued over, Continuance on old Terms presumed.

Where a partnership entered into for a fixed term is continued after the term has expired, and without any new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as consistent with the right of any partner to determine the partnership at will.[1]

A continuance of the business by the acting partner or partners, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.[2]

ILLUSTRATIONS.

1. A clause in partnership articles entered into between A and B, for a fixed term, provides that, "in case either of the said partners shall depart this life during the said copartnership term," the surviving partner shall purchase his share at a fixed value. A and B continue their business in partnership after the expiration of the term. This clause is still applicable on the death of either of them.[3]

2. Articles for a partnership for one year contain an arbitration clause, and the partnership is continued beyond the year. The arbitration clause is still binding.[4]

3. A and B are partners for seven years, A taking no active part in the business. After the end of the seven years B con

[1] I. C. A. 256 (slightly altered); Lindley, ii. 847.
[2] *Parsons* v. *Hayward*, 4 D. F. J. 474.
[3] *Essex* v. *Essex*, 20 Beav. 442.
[4] *Gillett* v. *Thornton*, 19 Eq. 599.

tinues the business, in the name, on the premises, and with the property of the firm, and without coming to an account. The partnership is not dissolved, and A is entitled to participate, on the terms of the original agreement, in the profits thus made by B.[1]

4. Partnership articles provide that a partner wishing to retire shall give notice of his intention a certain time beforehand. If the partnership is continued beyond the original term, this provision does not hold good, as not being consistent with a partnership at will.[2]

5. A and B enter into partnership for seven years, under articles which empower either partner, if the other neglects the business, to dissolve the partnership by notice, and purchase his share at a valuation. They continue in partnership after the seven years. This power of dissolution on special terms can no longer be exercised, as either party may now dissolve the partnership at will.[3]

Where Business continued by surviving Partners.

The same rule has been substantially acted upon in the case of a business being continued by the surviving partners after the death of a member of the original firm;[4] the Court inferred as a fact, from their conduct, that the business was continued on the old terms; but it is probably safe to assume that here, also, if there were nothing more than a want of evidence to the contrary, a continuance on the old terms would be presumed.

ARTICLE 44.

Partners must act for common Advantage.

"Partners are bound to carry on the business

[1] *Parsons* v. *Hayward*, 4 D. F. J. 474.
[2] *Featherstonhaugh* v. *Fenwick*, 17 Ves. at p. 307.
[3] *Clark* v. *Leach*, 32 Beav. 14, 1 D. J. S. 409; see the M. R.'s judgment, 32 Beav. 21.
[4] *King* v. *Chuck*, 17 Beav. 325.

of the partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives."[1]

This is a fundamental rule, for which it would be idle to cite specific authority.

Where written partnership articles are entered into, a clause to this effect is almost always inserted. There is no doubt, however, that the obligation of *uberrima fides* is incidental to the nature of the partnership contract, and the only object of expressing it on these occasions is to remind the partners of the duties imposed on them by the general law. The same remark applies to several other things which are usually expressed in such instruments. The practice is not altogether consistent with the general principles of conveyancing, but appears in this case to be reasonable and useful.

ARTICLE 45.

Partners must not make private Gain by Partnership Transactions.

Every partner must account to the firm for any benefit derived by him from a transaction concerning the partnership.[2]

ILLUSTRATIONS.

1. A, B, and C are partners in trade. C, without the knowl-

[1] I. C. A. 257.
[2] I. C. A. 258 (slightly altered).

edge of A and B, obtains for his sole benefit a renewal of the lease of the house in which the partnership business is carried on. A and B may, at their option, treat the renewed lease as partnership property.[1]

It would [probably] make no difference if C had given notice to A and B that he intended to apply for a renewal of the lease for his own exclusive benefit.[2]

2. A, B, C, and D are partners in the business of sugar-refiners. C is the managing partner, and also does business separately, with the consent of the others, as a sugar dealer. He buys sugar in his separate business and sells it to the firm, at a profit, at the fair market price of the day, but without letting the other partners know that the sugar is his. The firm is entitled to the profit made on every such sale.[3]

3. A, B, and C acquire the lease of certain works for the purposes of a business carried on by them in partnership, A conducting the transaction with the former lessees on behalf of the firm. The former lessees, being anxious to find a responsible assignee and get the works off their hands, pay a premium to A. A must account to his partners for the money thus received.[4]

Duties of surviving Partners in this Respect.

This rule holds good as between a surviving partner or surviving partners and the representatives of a deceased partner until the affairs of the firm have been completely wound up; thus, if there are leaseholds belonging to the partnership, and the surviving partner renews the lease before his relations with the representatives of the deceased partner are completely determined, the renewed lease must be treated as partnership property.[5]

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[1] *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; I. C. A. 258, Illust. *a*.
[2] *Clegg* v. *Edmondson*, 8 D. M. G. 787, 807.
[3] *Bentley* v. *Craven*, 18 Beav. 75.
[4] *Fawcett* v. *Whitehouse*, 1 Russ. & M. 131.
[5] *Clements* v. *Hall*, 2 De G. & J. 173, 186. The surviving partner is sometimes called a trustee, or *quasi* trustee, of the partnership property. But this use of the term is at least doubtful; see Lord Westbury's remarks in *Knox* v. *Gye*, L. R. 5 H. L. 675.

Parallel Rule in Agency.

The general principle is one of those which the law of partnership takes from agency, considering each partner as agent for the firm; or it is, perhaps, better to say that it is established in both these branches of the law on similar grounds. The rule that an agent must not deal on his own account, or make any undisclosed profit for himself in the business of his agency, is a stringent and universal one.[1]

ARTICLE 46.

Partner must not compete with Firm.

"If a partner, without the [knowledge and] consent of the other partners, carries on any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby."[2]

This is an elementary rule analogous to the last. It follows that no partner can, without the consent of the rest, be a member of another firm carrying on the like business in the same field of competition; and if that consent is given he is limited by its terms. And if special knowledge is acquired by him as a member of the one firm he must not use it for the benefit of the other and to the prejudice of the first. And this equally holds if several

[1] Story on Agency, §§ 210, 211; *Parker* v. *McKenna*, 10 Ch. 96; *Hay's Case*, *Ib.* 593; *Dunne* v. *English*, 18 Eq. 524.

[2] I. C. A. 259 (the words in brackets seem superfluous); Lindley, i. 611-613.

members, or even all the members but one, are common to both firms.

If A, B, C, and D are the proprietors of a morning newspaper, and A, B, and C the proprietors of an evening newspaper, for which the types and plant of the morning paper are used by agreement, D may restrain A, B, and C from first publishing in A, B, and C's evening paper intelligence obtained by the agency of the morning paper, and at the expense of the firm of A, B, C, and D.[1]

[1] *Glassington* v. *Thwaites*, 1 Sim. & St. 124.

PART II.

THE DISSOLUTION OF PARTNERSHIPS.

CHAPTER VII.

OF DISSOLUTION AND ITS CONSEQUENCES.

Where there is no agreement to the contrary between the partners, the dissolution of a partnership takes place in any of the events specified in the four following articles:

Article 47.

Dissolution of Partnership by Retirement of Partner.

If any partner gives notice to the other or others of his intention to dissolve the partnership, the partnership is dissolved as from the date of such notice.

"Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party. By that notice the partnership is dissolved to this extent: that the Court will compel the parties to act as

partners in a partnership existing only for the purpose of winding up the affairs."[1]

The dissolution takes place as from the date of the notice, and without regard to the state of mind of the partner to whom the notice is given. Insanity on his part does not make it less effectual.[2] Of insanity as a special ground of dissolution, when the partnership is not at will, we shall speak presently. A valid notice of dissolution, once given, cannot be withdrawn except by consent of all the partners.[3]

Where a partnership has been entered into for a fixed term, the partnership is at the end of that term dissolved "by effluxion of time," without any further act or notice, except in the cases mentioned in Art. 43, above.

ARTICLE 48.

By Bankruptcy, etc., of Partner.

The alienation of any partner's share by operation of law dissolves the partnership.

ILLUSTRATIONS.

If a partner becomes bankrupt or is outlawed, or if his interest in the partnership property is taken in execution,[4] or if a female partner marries without settling her share in the partnership to her separate use,[5] the partnership is thereby dissolved.[6]

[1] *Crawshay* v. *Maule*, 1 Swanst. at p. 508.
[2] *Mellersh* v. *Keen*, 27 Beav. 236; *Jones* v. *Lloyd*, 18 Eq. 265.
[3] *Jones* v. *Lloyd*, 18 Eq. at p. 271.
[4] Lindley, i. 712.
[5] There appears to be no reason why such a settlement should not be made; and, if it is made, there is no reason why the partnership should be dissolved. And *qu.* whether s. 1 of the Married Women's Property Act, 1870, has not the same effect even if there is no settlement. See Lindley, i. 86, 87. *Re Childs*, 9 Ch. 508, shows that for administrative purposes at least, a wife entitled, for her separate use, to a share of the profits of her husband's business may be considered as his partner.
[6] Lindley, i. 241.

Article 49.

By Death of Partner.

The death of any partner dissolves the partnership.[1]

Explanation. — In the absence of any previous agreement to the contrary, the partnership is dissolved in any of the cases mentioned in the three foregoing Articles as between all the members of the firm, and not only to that partner who retires, or who dies, or whose share becomes alienated.

Article 50.

By Assignment of Partner's Share in Partnership at Will.

If any partner assigns or encumbers his interest in the property or profits of the firm, the partnership not being for a fixed term, the partnership is thereby dissolved.[2]

Article 51.

By Business of Partnership becoming unlawful.

A partnership is in every case dissolved by the happening of an event which makes it unlawful for the business of the firm to be carried on, or

[1] *Ib.* i. 242.
[2] See on Art. 38, above.

for the members of the firm to carry it on in partnership.[1]

ILLUSTRATIONS.

1. A and B charter a ship to go to a foreign port and receive a cargo on their joint adventure. War breaks out between England and the country where the port is situated before the ship arrives at the port, and continues until after the time appointed for loading. The partnership between A and B is dissolved.[2]

2. A is a partner with ten other persons in a certain business. An Act is passed which makes it unlawful for more than ten persons to carry on that business in partnership. The partnership of which A was a member is dissolved.

3. A, an Englishman, and domiciled in England, is a partner with B, a domiciled foreigner. War breaks out between England and the country of B's domicile. The partnership between A and B is dissolved.[3]

ARTICLE 52.

Cause for Dissolution of Partnership by the Court.

The Court,[4] or, in the case of a partner becoming lunatic, the Lord Chancellor,[5] may dissolve the partnership, at the suit of a partner, in any of the following cases:

1. When a partner is found lunatic by inquisi-

[1] Lindley, i. 243; I. C. A. 255.
[2] See *Esposito* v. *Bowden*, 7 E. & B. 763.
[3] *Griswold* v. *Waddington* (Supreme Court, New York), 15 Johns. 57; 16 *Ib.* 438.
[4] All causes and matters for the dissolution of partnerships, or the taking of partnership accounts, are assigned to the Chancery Division (subject to Rules of Court or orders of transfer) by s. 34 of the Judicature Act, 1873.
[5] Lunacy Regulation Act, 1853, 16 & 17 Vict. c. 70, s. 123.

tion, or is shown to the satisfaction of the Court to be of permanently unsound mind.[1]

2. When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract.[2]

3. When a partner, other than the partner suing, becomes liable to a criminal prosecution.[3]

4. When a partner, other than the partner suing, so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner, or partners, to carry on the business in partnership with him.[4]

5. When a partner, other than the partner suing, the partnership being for a fixed term, assigns or encumbers his interest in the property or profits of the firm.[5]

6. When the business of the partnership can only be carried on at a loss.[6]

Dissolution at Suit of Partner of unsound Mind.

It is to be observed that the right of having the partnership dissolved in the case of one partner becoming insane is not confined to his fellow-partners. A dissolution may

[1] Lindley, i. 235-238; *Jones* v. *Hoy*, 2 M. & K. 125; *Anon.* 2 K. & J. 441; *Leaf* v. *Coles*, 1 D. M. G. 171.
[2] *Whitwell* v. *Arthur*, 35 Beav. 140.
[3] *Essell* v. *Hayward*, 30 Beav. 158.
[4] *Harrison* v. *Tennant*, 21 Beav. 482.
[5] Art. 38, above.
[6] *Jennings* v. *Baddeley*, 3 K. & J. 78.

be sought and obtained on behalf of the lunatic partner himself; and this may be done either by his committee in lunacy under the Lunacy Regulation Act, or, where he has not been found lunatic by inquisition, by an action brought in his name in the Chancery Division by another person as his next friend. In the latter case the Court may, if it thinks fit, direct an application to be made in Lunacy before finally disposing of the cause.[1]

What Conduct of a Partner is Ground for Dissolution.

It is rather difficult to fix the point at which acts of a partner tending to shake the credit of the firm and the other partners' confidence in him become sufficient ground for demanding a dissolution. The fact that a particular partner's continuance in the firm is injurious to its credit and custom is not of itself ground for a dissolution where it cannot be imputed to that partner's own wilful misconduct. In a case where one partner had been insane for a time, and while insane had attempted suicide, this was held not to be a cause for dissolution, although it was strongly urged that the credit of the firm could not be preserved if he remained in it.[2] On the other hand, conduct of a partner in the business carried on by the firm and its predecessors, though not in the actual business of the existing firm, which was calculated to destroy mutual confidence among the partners, has been held sufficient ground for a dissolution.[3]

Actual malversation of one partner in the partnership affairs, such as failing to account for sums received,[4] is

[1] *Jones* v. *Lloyd*, 18 Eq. 265.
[2] *Anon.* 2 K. & J. 441, 452.
[3] *Harrison* v. *Tennant*, 21 Beav. 482.
[4] *Cheemsan* v. *Price*, 35 Beav. 142.

ground for a dissolution; so is a state of hostility between the partners which has become chronic and renders mutual confidence impossible, as where they have habitually charged one another,[1] or one partner has habitually charged another,[2] with gross misconduct in the partnership affairs.

In *Atwood* v. *Maude*,[3] Lord Cairns said:

"It is evident . . . that in every partnership . . . such a state of feeling may arise and exist between the partners as to render it impossible that the partnership can continue with advantage to either;" and he added that, when it is admitted that this state of feeling does in fact exist, it becomes immaterial by whom a dissolution of the partnership is sought. If this *dictum* could be accepted to its full extent in the absence of positive authority, sub-section 4 of the foregoing Article might be put in a broader and simpler form to this effect:

"When a state of feeling has arisen and exists between the partners, or some of them, such that, in the judgment of the Court, a continuance of mutual confidence is thereby rendered impossible."

ARTICLE 53.

Rights of Creditors against apparent Members of Firm.

The rights of a creditor of a firm against its apparent members are not affected by any dissolution or change in the firm of which such creditor had not notice.[4]

[1] *Baxter* v. *West*, 1 Dr. & Sm. 173.
[2] *Watney* v. *Wells*, 30 Beav. 56; *Leary* v. *Shout*, 33 Beav. 582
[3] 3 Ch. at p. 373.
[4] Lindley, i. 421; I. C. A. 264.

An advertisement in the "London Gazette" is equivalent to notice as to creditors who were not in fact customers of the firm before the time of the dissolution or change.[1]

Exceptions.—The estate of a partner who dies,[2] or who becomes bankrupt,[3] or of a partner who, not having been known to the creditor to be a partner, retires from the firm,[4] is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

ILLUSTRATIONS.

1. A and B, partners in trade, agree to dissolve the partnership, and execute a deed for that purpose, declaring the partnership dissolved as from the 1st of January; but they do not discontinue the business of the firm or give notice of the dissolution. On the 1st of February A endorses a bill in the partnership name to C, who is not aware of the dissolution. The firm is liable on the bill.[5]

2. A bill is drawn on a firm in its usual name of the M. Company, and accepted by an authorized agent. A was formerly a partner in the firm, but not to the knowledge of B, the holder of the bill, and ceased to be so before the date of the bill. B cannot sue A upon the bill.[6]

3. A is a partner with other persons in a bank. A dies, and the survivors continue the business under the same firm. Afterwards the firm becomes insolvent. A's estate is liable to customers of the bank for the balances due to them at A's death, so far as they still remain due, and for other partner-

[1] Lindley, i. 429, 430.
[2] *Ib.* 418.
[3] *Ib.* 419.
[4] Lindley, i. 420.
[5] Per Lord Brougham; *Ex parte Robinson*, 3 D. & Ch. at p. 388.
[6] *Carter* v. *Whalley*, 1 B. & Ad. 11.

ship liabilities incurred before A's death;[1] but not for any debts contracted or liabilities incurred by the firm towards customers after A's death.[2]

In the case of liabilities of the firm which have arisen after A's death, it makes no difference that at the time when the partnership liability arose the customer believed A to be still living and a member of the firm.[3]

ARTICLE 54.

Right of Partners to notify Dissolution.

On the dissolution of a partnership, or retirement of a partner, any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.[4]

In the case referred to it appeared to be the practice of the "London Gazette" office not to insert a notice of dissolution unless signed by all the partners; and the defendant, who had refused to sign a notice, was decreed to do all things necessary for procuring notice of the dissolution to be inserted in the "Gazette."

ARTICLE 55.

Continuing Authority of Partners for Purposes of winding up.

After the dissolution of a firm, the authority

[1] *Devaynes* v. *Noble*, 1 Mer. 529; *Sleech's Case*, at p. 539; *Clayton's Case*, at p. 572.
[2] *Brice's Case*, *Ib.* 622.
[3] *Houlton's Case*, *Ib.* 616. The judgment itself in this case is not reported; but it appears by the marginal note and the context that it followed *Brice's Case*.
[4] *Troughton* v. *Hunter*, 18 Beav. 470.

of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as is necessary to settle and liquidate existing demands, and to complete transactions begun but unfinished at the time of the dissolution,[1] but not otherwise.

Exception. — The firm is in no case bound by the act of a bankrupt[2] partner, except as to any other partner who may be liable under Art. 13 or Art. 14.[3]

ILLUSTRATIONS.

1. A and B are partners. A becomes bankrupt. B gives acceptances of the firm as a security for an existing partnership debt to C, who knows of A's bankruptcy. C endorses the bills for value to D, who does not know of the bankruptcy. D is entitled to rank as a creditor of the firm for the amount of the bills.[4]

2. A and B are partners. A becomes bankrupt. B continues to carry on the trade of the firm, and pays partnership moneys into a bank to meet current bills of the firm. The bank is entitled to this money as against A's trustee in bankruptcy.[5]

3. A and B are partners in trade. A becomes bankrupt. The solvent partner, B, but not other persons claiming through him by representation or assignment, may, notwithstanding the dissolution of the partnership wrought by A's bankruptcy, sell any of the partnership goods to pay the debts of the firm,[6] and

[1] Lindley, i. 427, with slight verbal alteration. *Lyon* v. *Haynes*, 5 M. & Gr. 504, 541.

[2] Bankruptcy relates back to the completion of the act of bankruptcy on which the order of adjudication is made. Bankruptcy Act, 1869, s. 11.

[3] Lindley, ii. 1173.

[4] *Ex parte Robinson*, 3 Dea. & Ch. 376, and 1 Mont. & A. 18.

[5] *Woodbridge* v. *Swann*, 4 B. & Ad. 633.

[6] *Fraser* v. *Kershaw*, 2 K. & J. 496. The authority to sell is "personal to him in his capacity as partner" (p. 501).

the purchaser will be entitled to the entire property in such goods as against A's trustee in bankruptcy.[1]

4. A and B, share-brokers in partnership, buy certain railway shares. Before the shares are paid for they dissolve partnership. Either of them may pledge the shares to the bankers of the firm, to raise the purchase-money, and may authorize the bankers to sell the shares to indemnify themselves.[2]

5. A partner authorized to draw bills in the name of the firm may endorse in the name of the firm a bill which has been properly drawn on behalf of the firm, and payable to its order, during the existence of the partnership, notwithstanding that the firm has been dissolved between the dates of the drawing and of the endorsement. The partnership may be said not to be dissolved as to this bill, so as to prevent it from being endorsed by either partner in the name of the firm.[3]

6. A and B, having been partners in a business, dissolve partnership, and A takes over the business and property of the firm. If A gives negotiable instruments in the name of the old firm, then (subject to the rights of creditors of the firm stated in Art. 53) B is not bound thereby[4] unless he has specially authorized the continued use of the name for that purpose.[5]

7. Partnership articles provide that, before each division of profits, interest shall be credited to both partners on the amount of capital standing to the credit of their respective accounts. This alone does not authorize the allowance of interest, in the event of a dissolution, for the interval between the dissolution and the final settlement of the partnership accounts.[6]

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[1] *Fox* v. *Hanbury*, Cow. 445.
[2] *Butchart* v. *Dresser*, 4 D. M. G. 542.
[3] *Lewis* v. *Reilly*, 1 Q. B. 349; see judgment of Lord Denman, C. J., and Mr. Justice Lindley's note, i. 428. The correctness of the decision has been disputed (*Ib* 424; Dixon on Partnership, 147, 499), but it is treated as good law by the Ex. Ch. in *Garland* v. *Jacomb*, L. R. 8 Ex. at p. 220. *Smith* v. *Winter*, 4 M. & W. 454 (not cited in *Lewis* v. *Reilly*), certainly seems to assume the necessity of some evidence of special authority to use the partnership name in this way after dissolution even for the purpose of liquidating the affairs of the firm.
[4] *Heath* v. *Sansom*, 4 B. & Ad. 172.
[5] *Smith* v. *Winter*, 4 M. & W. 454.
[6] *Barfield* v. *Loughborough*, 8 Ch. 1.

8. A, B, and C are partners. A and B commit acts of bankruptcy, and afterwards endorse in the name of the firm a bill belonging to the partnership. The endorsee acquires no property in the bill.[1]

9. A and B are partners. C is a creditor of the firm. A, having committed an act of bankruptcy to the knowledge of C,[2] pays C's debt. This is an unauthorized payment as against the firm, and, if the firm afterwards become bankrupt, C must repay the money to the trustee of the joint estate.[3]

10. A and B are partners. A commits an act of bankruptcy, and afterwards accepts a bill in the name of the firm for his own private purposes, which comes into the hands of a holder in good faith and for value. B is liable on the bill, as A and B were ostensibly partners with the assent of B when the acceptance was given.[4]

11. [A, B, and C are partners in a woollen mill. A dies, and B and C continue the business. D, the owner of the mill, distrains for the arrears of rent which were partly due in the lifetime of A. B and C agree with D that he shall take the partnership fixtures and machinery in satisfaction of the rent, and relet them to B and C, the transaction being in effect a mortgage. This does not affect A's interest in the fixtures and goods comprised in the conveyance, and D is not entitled to the entire property in them as against A's executors.[5]]

On this subject the language of the Indian Contract Act (sec. 263) is more general. It says:

"After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership."

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[1] *Thomason* v. *Frere*, 10 East, 418.

[2] If C had not notice of the act of bankruptcy, he would be protected by sec. 94, sub-s. 3, of the Bankruptcy Act, 1869.

[3] *Craven* v. *Edmondson*, 6 Bing. 734.

[4] *Lacy* v. *Woolcott*, 2 D. & R. 458.

[5] *Buckley* v. *Barber*, 6 Ex. 164. This decision is not consistent with the general current of authorities, and is probably wrong. It is expressly dissented from by Mr. Justice Lindley in the last edition of his work (in addenda, vol. i. p. xciii.), and is there said to have been disapproved in an unreported case by James, L. J.

And Lord Eldon spoke more than once of a partnership after dissolution as being, in one sense, not dissolved until the affairs of the firm are wound up.[1]

Mr. Justice Lindley shows, however (i. 426–428), that a more guarded statement is, at least, desirable. Paulus incidentally mentions the rule as existing in some such limited form in the Roman law:

"*Si vivo Titio negotia eius administrare coepi, intermittere mortuo eo non debeo; nova tamen inchoare necesse mihi non est, vetera explicare ac conservare necessarium est;* ut accidit, cum alter ex sociis mortuus est."[2]

[1] 1 Swanst. 508 (see on Art. 47, above); 2 Russ. 337, 342.
[2] D. 3, 5, *de negot. gest.* 21, § 2.

CHAPTER VIII.

RIGHTS OF PARTNERS AFTER DISSOLUTION.

ARTICLE 56.

Rights of Partners as to Application of Partnership Property.

"Every partner has a right," as against the other partners in the firm and all persons claiming through them in respect of their interests as partners, "to have the property of the partnership applied in payment of the debts and liabilities of the firm," and to have the surplus assets, after such payment, "applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm;" [1] and for that purpose any partner or his representatives may, upon the termination of the partnership, apply to the Court to wind up the business and affairs of the firm.[2]

ILLUSTRATIONS.

1. One of the partners in a firm becomes bankrupt. All debts due from him to the firm must be satisfied out of his share of

[1] Lindley, i. 700.
[2] Common practice; compare I. C. A. 265.

the partnership property before recourse is had to such share for payment of debts due either to any of the partners on his private account or to any other person.[1]

2. A creditor of one partner in a firm, on a separate account unconnected with the partnership, takes his share in the partnership property in execution. He is entitled, at most, to the amount of that partner's interest after deducting everything then due from him to the other partners on the partnership account;[2] but, in such deduction, debts due to all or any of the other partners, otherwise than on the partnership account, are not to be included.[3]

3. A and B are partners, having equal shares in their business. A dies, and B continues to employ his share of the partnership capital in the business without authority, thereby becoming liable to A's estate for a moiety of the profits.[4] A's estate is entitled, not only to a moiety of the partnership property, but to a lien upon the other moiety for the share of profits due to the estate.[5]

4. A and B are partners. The partnership is dissolved by agreement, and the agreement provides that B shall take over the business and property of the firm and pay its debts. B takes possession of the property and continues the business, but does not pay all the debts, and, some time afterwards, mortgages a policy of assurance, part of the assets of the late partnership, to C, who knows the facts above mentioned, and also knows that the policy mortgaged to him is part of the partnership assets. A, or his representatives, may require any part of the partnership property remaining in the hands of B to be applied in payment of the unpaid debts of the firm, but they have no such right as to the policy mortgaged to C. Here C claims through A, not as partner, but as sole owner, and is not bound to see to the application of his money.[6]

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[1] *Croft* v. *Pike*, 3 P. Wms. 180; and see Ch. xi. Art. 75–78, below.

[2] *West* v. *Skip*, 1 Ves. Sen. 239, 242; per Lord Mansfield, *Fox* v. *Hanbury*, Cowp. at p. 449.

[3] *Skipp* v. *Harwood*, 2 Swanst. 587; Lindley, i. 703.

[4] See Art. 60, below.

[5] *Stocken* v. *Dawson*, 9 Beav. 239.

[6] *Re Langmead's Trusts*, 20 Beav. 20, 7 D. M. G. 353.

Nature of the Right as Lien or Quasi-*Lien.*

The general rule has been thus stated: that, "on the dissolution of the partnership, all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital."[1]

The right of each partner to control, within certain limits, the disposition of the partnership property is a rather peculiar one. It exists during the partnership, and when accounts are taken and the partners' shares ascertained, from time to time, its existence is assumed; but it comes into full play only in the event of a dissolution. It belongs to a class of rights known as *equitable liens*, which have nothing to do with possession, and must, therefore, be carefully distinguished from the *possessory liens* which are familiar in several heads of the common law. The possessory lien of an unpaid vendor, factor, or the like, is a mere right to hold the goods of another man until he makes a certain payment; it does not, as a rule, carry with it the right of dealing with the goods in any way.[2] Equitable lien, on the other hand, is nothing else than the right to have a specific portion of property dealt with in a particular way for the satisfaction of specific claims.

Against whom available.

The lien, or *quasi*-lien,[3] as it is sometimes called, of each partner on the partnership property is available against the other partners, and against all persons claim-

[1] *Darby* v. *Darby*, 3 Drew. at p. 503.
[2] On the still unsettled question of an unpaid vendor's rights in this respect, see *Page* v. *Cowasjee Eduljee*, L. R. 1 P. C. 145.
[3] 25 Beav. 286.

ing an interest in a partner's share as such. We have already seen that an assignee of a partner's share takes it subject to all claims of the other partners (Art. 38). But a purchaser or pledgee of partnership property from a partner, unless he has notice of an actual want of authority to dispose of it, is entitled to assume that his money will be properly applied for partnership purposes, and may rely on the disposing partner's receipt as a complete discharge.[1] Likewise the individual partners cannot require a judgment creditor of the firm to pursue his remedy against the partnership property before having recourse to the separate property of the partners;[2] for, as we have seen above (on Art. 11, p. 14), English law does not recognize the firm as having rights or liabilities distinct from those of the individual partners, and a judgment against a firm of partners is nothing else than a judgment against the partners as joint debtors, and is treated like any other judgment of that nature. There seems to be nothing to alter this in the Rule of Court now in force as to judgments against partners in the name of the firm.[3] Creditors, on the other hand, have no specific rights against any property of the firm except such as they may acquire by actually taking it in execution.[4]

Applies only to Partnership Property at Date of Dissolution.

During a partnership, the lien in question attaches to all partnership property for the time being. Upon a dissolution, it extends only to the partnership property existing as such at the date of dissolution. Therefore, if one of

[1] *Langmead's Trusts*, see Illust. 4, above.
[2] Lindley, i. 541, 700.
[3] Rules of the Supreme Court, Order xlii. r. 8; Art. 67, below.
[4] *Stocken* v. *Dawson*, 9 Beav. 239.

two partners dies, and the executors of the deceased partner allow the survivor to continue the business of the firm, there will be no lien in their favor on property acquired by him in this course of business in addition to, or in substitution for, partnership property; and, in the event of the surviving partner's bankruptcy, goods brought into the business by him will belong to his creditors in the new business, not to the creditors of the former partnership.[1] It is probable, however, that a surviving partner who insisted on carrying on the business against the will of the deceased partner's representatives would be estopped from showing that property in his hands, and employed in the business, was not part of the actual partnership assets.[2]

ARTICLE 57.

Sale of Good-Will on Dissolution.

On the dissolution of a partnership every partner has a right, in the absence of any agreement to the contrary, to have the good-will of the business sold for the common benefit of all the partners.[3]

Rights and Duties of Vendor and Purchaser of Good-Will.

Explanation. — Where the good-will of a busi-

[1] *Payne* v. *Hornby*, 25 Beav. 280, 286, 287.

[2] This is given as the general rule in Dixon on Partnership, 493, and the rule in *Payne* v. *Hornby* as the exception; and a *dictum* of Lord Hardwicke's is there cited (*West* v. *Skip*, 1 Ves. Sen. 244) that the lien extends to stock brought in after the determination of the partnership. But this *dictum* relies on an old case of *Bucknal* v. *Roiston*, Pre. Ch. 285, which was a case not of partnership at all, but of a continuing pledge of stock in trade; from which the partner's lien is expressly distinguished in *Payne* v. *Hornby*.

[3] Lindley, ii. 885.

ness, whether carried on in partnership or not, is sold, the rights and duties of the vendor and purchaser are determined by the following rules, in the absence of any special agreement excluding or varying their effect:

a. The purchaser alone may represent himself as continuing or succeeding to the business of the vendor.[1]

b. The vendor may, nevertheless, carry on a similar business in competition with the purchaser, but not under the name of the former firm, nor so as to represent himself as continuing or succeeding to the same business.[1]

c. He may publicly advertise his business, but must not privately or specially solicit the customers of the former firm.[2]

d. The purchaser [probably] may not continue to use the name of the former firm without qualification, if such use would expose the vendor to be sued as an apparent partner in the business.[3]

e. The foregoing rules apply to the sale by a retiring partner, or a surviving partner, or the representatives of a deceased partner, to continuing or incoming partners, or to any other purchaser of the business of the firm, of his or their

[1] *Churton* v. *Douglas*, Johns. 174.
[2] *Labouchere* v. *Dawson*, 13 Eq. 322.
[3] *Churton* v. *Douglas*, Johns. at p. 190.

share or interest in the good-will of the business carried on by the firm.[1]

ILLUSTRATIONS.

1. A, B, and C have carried on business in partnership under the firm of A & Co. A retires from the firm on the terms of the other partners purchasing from him his interest in the business and good-will, and D is taken in as a new partner. B, C, and D continue the business under the firm of "B, C & D, late A & Co." A may set up a similar business of his own, next door to them, but not under the firm of A & Co.[2]

2. One of several persons carrying on business in partnership having died, the affairs of the partnership are wound up by the Court, and a sale of the partnership assets, including the good-will, is directed. The good-will must not be valued on the supposition that any surviving partner, if he does not himself become the purchaser, can be restrained from setting up the same kind of business on his own account;[3] for "no Court can prevent the late partners from engaging in the same business, and therefore the sale cannot proceed upon the same principles as if a Court could prevent their so engaging."[4]

Nature and Incidents of "Good-Will."

The term *good-will* is a commercial rather than a legal one, nor is its use confined to the affairs of partnership firms. It is well understood in business, but not easy to define. It has been described as "the benefit arising from connection and reputation,"[5] "the probability of the

[1] The rules are, in fact, established almost entirely by decisions on partnership cases. *Labouchere* v. *Dawson*, above, is a case in which no partnership was in question.

[2] *Churton* v. *Douglas*, Johns. 174.

[3] *Hall* v. *Barrows*, 4 D. J. S. at p. 159.

[4] Lord Eldon's decree in *Cook* v. *Collingridge*, given in 27 Beav. 456, 459. The declarations and directions there inserted contain an exposition of the nature and legal incidents of *good-will* to which there is still little to add in substance.

[5] Lindley, ii. 884.

old customers going to the new firm" which has acquired the business.[1] That which the purchaser of a good-will actually acquires, as between himself and his vendor, is the right to carry on the same business under the old name (with such addition or qualification, if any, as may be necessary for the protection of the vendor from liability or exposure to litigation under the doctrine of "holding out"), and to represent himself to former customers as the successor to that business.[2] Unless there is an express agreement to the contrary, the vendor remains free to compete with the purchaser in the same line of business;[3] and he may publish to the world, by advertisements or otherwise, the fact that he carries on such business. But he may not specially solicit the customers of the old firm to transfer their custom to him,[4] and he must not use the name of the old firm so as to represent that he is continuing, not merely a similar business, but the *same* business: "You are not to say, I am the owner of that which I have sold."[5] Probably the purchasers of the business might successfully object even to his carrying on a competing business in his own name alone, if that name had been used as the name of the late firm and had become part of its good-will.[6] These rights of vendors and purchasers of good-will clearly belong to the province of law, and are capable of legal definition; I have accordingly tried to state them distinctly in the explanation annexed

[1] Lord Romilly, M. R., *Labouchere* v. *Dawson*, 13 Eq. at p. 324; and see *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456; *Wedderburn* v. *Wedderburn*, 22 Beav. at p. 104.
[2] Lindley, ii. 879.
[3] *Churton* v. *Douglas*, Johns. 174.
[4] *Labouchere* v. *Dawson*, 13 Eq. 322.
[5] *Churton* v. *Douglas*, Johns. 193.
[6] *Churton* v. *Douglas*, Johns. 197, 198. As to the right to the exclusive use of a trade name, see Art. 11, above.

to the last Article, but for the reasons already indicated I have not sought to define the term *good-will* itself.

Good-Will does not "survive."

It was formerly supposed that, on the death of a partner in a firm, the good-will *survived* — that is, that the surviving partners were entitled to the whole benefit of it without any express agreement to that effect. But it is now perfectly settled that this is not so.[1]

Article 58.

Right of Partners to restrain Use of Partnership Name.

After a dissolution, each of the partners in the dissolved firm, or his representatives, may [probably], in the absence of any agreement to the contrary, restrain any other partner, or his representatives, from carrying on the same business under the partnership name, until the affairs of the firm have been wound up and the partnership property disposed of.[2]

This is maintained by Mr. Justice Lindley, notwithstanding a certain amount of apparent authority to the contrary,[3] as a necessary consequence of the principle

[1] The notion of the good-will surviving is expressly contradicted, for instance, in *Everett* v. *Smith*, 27 Beav. 446.

[2] Lindley, ii. 887.

[3] *Banks* v. *Gibson*, 34 Beav. 566, looks, at first sight, like a direct authority *contra*. But there it appears that the assets of the firm had been divided by agreement between the late partners, and the affairs of the firm wound up before the suit was brought. The good-will, in fact, had ceased to exist, the partners having practically waived the right of having its value realized. Thus the decision is not inconsistent with Mr. Justice Lindley's reasoning or with the proposition given in the text.

stated in the last Article. If any partner who may require it has a right to have the good-will sold for the common benefit, it cannot be that each partner is also entitled to do that which would deprive the good-will of all salable value. There is express authority to show that, while a liquidation of partnership affairs is pending, one partner must not use the name or property of the partnership to carry on business on his own sole account, since it is the duty of every partner to do nothing to prejudice the salable value of the partnership property until the sale.[1] This question does not in any case affect the independent right of a late partner, who is living and not bankrupt, to restrain the successor to the business from continuing the use of his name therein so as to expose him to the risk of being sued as an apparent partner.[2]

ARTICLE 59.

Apportionment of Premium in certain Cases where Partnership prematurely dissolved.

Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of such term otherwise than by the death of a partner,[3] then, subject to any special agreement between the partners, the Court may order the premium, or a proportionate part thereof, to be repaid.

[1] *Turner* v. *Major*, 3 Giff. 442.
[2] *Scott* v. *Rowland*, 20 W. R. 508.
[3] See Lindley, i. 76, *Whincup* v. *Hughes*, L. R. 6 C. P. 78.

In fixing the proportion of the premium to be returned, the Court has regard to the conduct of the partners, the terms of the partnership contract, and the length of time during which the partnership has continued.

ILLUSTRATIONS.

1. A and B enter into a partnership for five years, on the terms of A paying a premium of £1,050 to B, £500 immediately and the rest by instalments. In the second year of the partnership term, and before the whole of the premium has been paid, A is adjudicated a bankrupt on the petition of B. B is not entitled to any further payments on account of the premium, the partnership having been determined by his own act, and he may retain only so much of the part already paid to him as the Court thinks just.[1]

2. A and B enter into a partnership for a term of years, A paying a premium to B. Long before the expiration of the term B becomes bankrupt.

It has been held that B's estate is entitled to the whole premium, because A bought the right of becoming his partner subject to the chance of the partnership being prematurely determined by ordinary contingencies, such as death or bankruptcy;[2]

And also that B's estate must return or give credit for a proportionate part of the premium, as the bankruptcy which determined the partnership was B's own act.[3]

3. A and B enter into partnership for fourteen years, B paying a premium to A. In the course of the same year differences arise; there is a quarrel in which, in the opinion of the

[1] *Hamil* v. *Stokes*, 4 Pri. 161, and better in Dan. 20.

[2] *Akhurst* v. *Jackson*, 1 Swanst. 85. No stress is laid on the fact that at the commencement of the partnership A knew that B was in embarrassed circumstances, which is the only point on which the case can be distinguished from *Freeland* v. *Stansfeld*; see *Atwood* v. *Maude*, 3 Ch. at p. 372.

[3] *Freeland* v. *Stansfeld*, 1 Sm. & G. 479.

Court, A and B are both to blame; A excludes B from the business and premises of the partnership, and B sues A for a dissolution of partnership and return of the premium. A is entitled to retain only so much of the premium as bears the same proportion to its whole amount as the time for which the partnership has actually lasted bears to the whole term first agreed upon.[1]

4. A and B are partners for a term of fourteen years, B having paid a premium of £600 to A. At the end of seven years of the term B gives notice of dissolution to A, under a power contained in the partnership articles, on the ground of A's neglect of the business; and B claims to have the premium apportioned on the principle of the last illustration. B is not entitled to the return of half the premium, but only to such allowance as the Court thinks proper on a general estimate of the case.[2]

5. A and B enter into partnership for fourteen years, A paying a premium calculated on two years' purchase of the net profits of the business. The partnership is dissolved within two years, in consequence of mutual disagreements. No part of the premium is repayable.[3]

6. A takes B into partnership for seven years, knowing him to be inexperienced in the business, and requires him on that account to pay a premium. After two years A calls on B to dissolve the partnership, on the ground of B's incompetence, and B sues A for a dissolution and the return of an apportioned part of the premium. B is entitled to the return of such a part of the premium as bears the same proportion to the whole sum which the unexpired period of the term of seven years bears to the whole term.[4]

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[1] *Bury* v. *Allen*, 1 Coll. 589; the proportion to be returned or allowed for was calculated on the same principle in *Astle* v. *Wright*, 23 Beav. 77, *Pease* v. *Hewitt*, 31 Beav. 22, *Wilson* v. *Johnstone*, 16 Eq. 606.

[2] *Bullock* v. *Crockett*, 3 Giff. 507. There not quite seven years of the term had in fact elapsed, but the Court allowed only £100 to the partner who had paid £600 premium. The same rule of unlimited discretion as to the amount to be returned was acted upon in *Freeland* v. *Stansfeld*, supra.

[3] *Airey* v. *Borham*, 20 Beav. 620.

[4] *Atwood* v. *Maude*, 3 Ch. 369.

7. A and B enter into partnership for fourteen years, A paying a premium. In the fourth year disputes arise, and a dissolution of the partnership by consent is gazetted. No agreement is made at the time of dissolution for the return of any part of the premium. A cannot afterwards claim to have any part of it returned.[1]

Discrepancy of Authorities: Rule proposed in Wilson *v.* Johnstone.

It will be seen from the illustrations that no definite rule can be given which will reconcile the existing authorities. I have therefore stated the jurisdiction as a discretionary one, though I do not know that it has ever been expressly so treated. In *Wilson* v. *Johnstone*,[2] Wickens, V.-C., gave his opinion as to what the rule ought to be on principle. He considered it applicable only to a "premature dissolution by the Court, as distinguished from premature dissolution by contract" (this is hardly consistent with the practice as shown in the reported cases, for in several of them the partners were agreed that there must be a dissolution, and the return or apportionment of the premium was the only matter in dispute); but, in the event of a dissolution by the Court, the partner who had paid the premium was entitled, he thought, as of right, to the return of a part of it proportionate to the time by which the intended term had been shortened, the premium being treated "as if it were an aggregate of yearly payments made in advance" (here the weight of authority is decidedly in favor of this mode of calculation); unless, indeed, the dissolution were caused by his own gross misconduct (being something more than simple breach of duty) in the affairs of

[1] *Lee* v. *Page*, 30 L. J. Ch. 857.
[2] 16 Eq. 606.

the partnership, or he had otherwise shown an intention to repudiate the partnership contract altogether.

Rule as given in Atwood *v.* Maude.

On the other hand, if we might take the rule simply from the judgment in *Atwood* v. *Maude*,[1] the latest case on the subject in a Court of Appeal, the latter part of it might stand thus:

"The Court will order the repayment of the premium, or such proportionate part thereof as it thinks just, having regard to the terms of partnership contract and to the length of time during which the partnership has continued;

unless the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium;

or unless the partnership has been dissolved by agreement, and in such agreement no provision has been made for a return of any part of the premium.

In the absence of special reasons to the contrary, the proportionate part to be returned will be a sum bearing the same proportion to the whole premium as the unexpired part of the partnership term originally contracted for bears to the whole term."[2]

One cannot help regretting that, in deciding *Atwood* v. *Maude*,[3] the Court did not take occasion to overrule expressly some of the former cases.

[1] 3 Ch. 369.

[2] Let P = the whole premium, T = the term agreed upon, t = the time the partnership has actually lasted, x = the part of the premium to be returned or allowed for: then $x = \frac{t}{T}$ P.

[3] 3 Ch. 369.

ARTICLE 60.

Right of outgoing Partner, in certain Cases, to Share of Profits after Dissolution.

Where any member of a firm has died, or otherwise ceased to be a partner, and the surviving or continuing partner or partners carry on the business of the firm with his capital or assets, without any final settlement of accounts as between the firm and the outgoing partner or his estate, there, in the absence of any special agreement to the contrary, the outgoing partner or his estate is entitled, at the option of such partner or his representatives, to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his capital or assets, or to the amount of such capital or assets with interest thereon at 5 per cent.[1]

Explanation. — How far the profits made since the dissolution are attributable to the outgoing partner's capital is a question to be determined with regard to the nature of the business, the amount of capital employed in it, the skill and industry of each partner taking part in it, and the conduct of the parties generally.[2] There is

[1] Lindley, ii. 1034 *seq.* Per Lord Cairns, *Vyse* v. *Foster*, L. R. 7 H. L. at p. 329.

[2] Turner, L. J., in *Simpson* v. *Chapman*, 4 D. M. G. at pp. 171, 172, following and approving Wigram, V.-C.'s, exposition in *Willett* v. *Blanford*, 1 Ha. 253, 266, 272.

no fixed rule that the profits are divisible in the same manner as if the partnership had not ceased.[1]

ILLUSTRATIONS.

1. A, B, and C are partners in a manufacture of machinery. A is entitled to three-eighths of the partnership property and profits. A becomes bankrupt, and B and C continue the business without paying out A's share of the partnership assets or settling accounts with his estate. A's estate is entitled to three-eighths of the profits made in the business from the date of his bankruptcy until the final liquidation of the partnership affairs.[2]

2. A and B are partners. The partnership is dissolved by consent, and it is agreed that the assets and business of the firm shall be sold by auction. A, nevertheless, continues to carry on the business on the partnership premises, and with the partnership property and capital, and upon his own account. He must account to B for the profits thus made.[3]

3. A and B trade in partnership as merchants. A dies, and B continues the business with A's capital. B must account to A's estate for the profits made since A's death, but the court will make in B's favor such allowance as it thinks just for his skill and trouble in managing the business.[4]

4. A, B, and C are merchants trading in partnership under articles which provide that upon the death of any partner the good-will of the business shall belong exclusively to the survivors. A dies, and B and C pay or account for interest to his legatees upon the estimated value of his share at the time of his death, but do not pay out the capital amount thereof. The firm afterwards makes large profits, but the nature of the business and the circumstances at the time of A's death were such that at that time any attempt to realize the assets of the firm or the amount of A's share would have been highly imprudent,

[1] *Brown* v. *De Tastet*, Jac. at p. 296.
[2] *Crawshay* v. *Collins*, 2 Russ. 325, 342-345, 347.
[3] *Turner* v. *Major*, 3 Giff. 442.
[4] *Brown* v. *De Tastet*, Jac. 284, 299.

and would have endangered the solvency of the firm, so that A's share in the partnership assets, if then ascertained by a forced winding up, would have been of no value whatever. Under these circumstances the profits made in the business after A's death are chiefly attributable, not to A's share of capital, but to the good-will and reputation of the business and the skill of the surviving partners, and A's legatees have no claim to participate in such profits to any greater extent than the amounts already paid or accounted for to them in respect of interest on the estimated value of A's share.[1]

5. The facts are as in the last illustration, except that the articles do not provide that the good-will shall belong to surviving partners. The deceased partner's estate is entitled to share in the profits made since his death, and attributable to good-will, in a proportion corresponding to his interest in the value of the good-will itself as a partnership asset. The evidence of experts in the particular business will be admitted, if necessary, to ascertain how much of the profits was attributable to good-will.[2]

6. A and B are partners, sharing profits equally, in a business in which A finds the capital and B the skill. B dies before there has been time for his skill in the business to create a good-will of appreciable value for the firm. A continues the business of the firm with the assistance of other skilled persons. B's estate is [probably] not entitled to any share of the profits made after B's death.

7. The other facts being as in the last illustration, B dies after his skill in the business has created a connection and good-will for the firm. B's estate is [probably] entitled to a share of the profits made after B's death.[3]

ARTICLE 61.

Exercise of Option to purchase outgoing Partner's Share.

Where by the partnership contract an option

[1] *Wedderburn* v. *Wedderburn*, 22 Beav. 84, 123, 124.
[2] See 22 Beav. at pp. 104, 112, 122.
[3] These two last cases are given by Wigram, V.-C., in his judgment in *Willett* v. *Blanford*, 1 Ha. at p. 271.

is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and such option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner, assuming to act in exercise of such option as aforesaid, does not in all material respects comply with the terms thereof, he is liable to account for subsequent profits under the last preceding Article.[1]

ILLUSTRATIONS.

1. A, B, and C are partners under articles which provide that, on the death of A, B, or C, the survivor of them may continue the business in partnership with A's representatives or nominees, taking at the same time an increased share in the profits; and that, in that case, B or C, or the survivor of them, shall enter into new articles of partnership, pay out in a specified manner the value of the part of A's interest taken over, and give security to A's representatives. B dies, then A dies. C carries on the business without pursuing the provisions of the articles as to entering into new articles, or paying out the value of the part of A's interest which he is entitled to acquire, or giving security. C must account to A's estate for subsequent profits.[2]

2. A, B, and C are partners under articles which provide that, in case of the death of any partner, the value of his share shall be ascertained as herein provided, with an allowance in lieu of profits at the rate of 5 per cent. per annum upon his share of the capital, and that the moneys found to be due to his execu-

[1] *Vyse* v. *Foster*, L. R. 7 H. L. at p. 329.
[2] *Willett* v. *Blanford*, 1 Ha. 253, 264.

tors shall be taken in full for the purchase of his share, and shall be paid out in a certain manner by instalments extending over two years. A dies. B and C ascertain the amount of his share, and pay interest thereon to his representatives, but, acting in good faith for the benefit of the persons interested, they do not pay out the capital within the two years. This delay in making the complete payment out is not a material non-compliance with the terms of the option of purchase, and B and C cannot be called upon to account to A's estate for profits subsequent to A's death.[1]

Claims against surviving or continuing Partners as Executors or Trustees.

The reader who is already acquainted with the cases now cited by way of illustration will perceive that several of them have been designedly simplified in statement. It often happens that a partner in a firm, disposing of his interest in it by will, and not desiring the affairs of the firm to be exposed to the interference of strangers, makes his fellow-partners, or some of them, his executors or trustees, or includes one or more of them among the persons appointed to those offices. If, having done this, he dies while the partnership is subsisting, there may arise at the same time, and either wholly or in part in the same persons, two kinds of duty in respect of the testator's interest, which are in many ways alike in their nature and incidents, but must be, nevertheless, kept distinct. There is the duty of the surviving partners *as partners* towards the deceased partner's estate; and of this we have just spoken. There is also the duty of the same persons, or some of them, *as executors or trustees* towards the persons beneficially interested in that estate; and this is determined by principles which are really independent of the law of partnership.

[1] *Vyse* v. *Foster*, L. R. 7 H. L. 318.

These distinguished by further Illustrations.

The nature of these complications and the distinctions to be observed may be exhibited by some further illustrations:

a. A and B are partners. A dies, having appointed B his sole executor, and B carries on the trade with A's capital. Here B is answerable to A's estate as partner, and A's executor, if he were a person other than B himself, would be the proper person to enforce that liability. B is also answerable *as executor*, to the persons beneficially interested in A's estate, for the improper employment of his testator's assets.

b. A, a trader, appoints B his executor, and dies. B enters into partnership with C and D in the same trade, and employs the testator's assets in the partnership business. B gives an indemnity to C and D, against the claim of A's residuary legatees. Here C and D are jointly liable with B to A's residuary legatees, not as partners, but as having knowingly made themselves parties to the breach of trust committed by B.[1]

c. A, being in partnership with B and C, appoints B his executor, and dies. B and C continue to employ A's capital in the business. B is liable *as executor* to account for the profits received by himself from the use of A's capital, but not for the whole profits received therefrom by the firm.[2]

d. A and B are partners in trade. A dies, having appointed C and D his executors, and authorized them to continue his capital in the trade for a limited time. On the expiration of that time C and D do not withdraw their testator's capital, but leave it as a loan to the firm, B and E, the then members of the firm, knowing the limit of the authority given by A's will and knowing the fund to belong to A's estate. B and E are not liable to render to the persons interested under A's will an account of profits since the time when A's capital ought to have been finally withdrawn, inasmuch as C and D themselves are liable to A's legatees only to make good the amount of the capital with interest.[3]

[1] *Flockton* v. *Bunning*, 8 Ch. 223, *n.*
[2] Per Lord Cairns, L. R. 7 H. L. 334.
[3] *Strovd* v. *Gwyer*, 28 Beav. 130.

e. If the other facts are as in the last illustration, but B, one of A's executors, is himself a member of the firm, C and D, the other executors, are still not accountable for any share of the profits.[1] B cannot be charged as executor with a greater share of profits in respect of his testator's capital than he has actually received,[2] and it is doubtful whether he can be charged with profits at all.[1]

f. A, B, and C are partners in a bank which is carried on upon the known private credit of the partners, and with little or no capital. A dies, having appointed C and D his executors. At the time of A's death his debt to the bank, on his private account, exceeds his share in the assets. B and C take D into partnership, and continue the business without paying out A's share. C and D are not accountable as executors for any share of the profits since A's death, as A really left no capital in the business to which such profits could be attributed, and D entered the partnership and shared the profits, not as executor, but on his own private account. In like manner B, C, and D are [probably] not accountable to A's estate as partners.[3]

Claims must be distinct, and against proper Parties in proper Capacity.

In these "mixed and difficult" cases, as Mr. Justice Lindley calls them,[4] it is important for persons seeking to assert their right to an account of profits to make up their minds distinctly in what capacity, and on the score of what duty, they will charge the surviving partners, or any of them. If they proceed against executors as such, for what is really a partnership liability, if any, and without bringing all the members of the firm before the Court,

[1] *Vyse* v. *Foster*, L. R. 7 H. L. 318; see per Lord Selborne, at p. 346.
[2] *Jones* v. *Foxall*, 15 Beav. 388; per James, L. J., *Vyse* v. *Foster*, 8 Ch. at pp. 233, 334.
[3] *Simpson* v. *Chapman*, 4 D. M. G. 154.
[4] ii. 1036.

failure will be the inevitable result.[1] In a single case, where one surviving partner out of several was held solely liable for the profits made by the employment of a deceased partner's capital by the firm, there was in fact only a *sub-partnership* between this survivor and the deceased; and it was therefore held that the other members of the principal firm were under no duty to the estate of one who was not *their* partner at all, and were not necessary or proper parties to be sued.[2]

And must be for Profits alone, or for Interest alone.

Again, the right, where it exists, is an alternative right to interest on the capital improperly retained in the business, or to an account of the profits made by its use; and one or other of these alternatives must be distinctly chosen. A double claim for both profits and interest is, of course, inadmissible, and it has been laid down that a mixed claim is equally so. "If relief can be obtained on the footing of an account of profits, it must be an account of profits, and nothing else;" a claim for profits as to part of the time over which the dealing extends, and interest as to other part, or for profits against some or one of the surviving partners, and interest against others, cannot be allowed.[3]

Account of Profits after Dissolution useless in Practice.

It is a question, however, whether success in asserting claims of this kind is not in practice little more profitable than failure; for an account of profits after dissolution

[1] See *Simpson* v. *Chapman*, 4 D. M. G. 154; *Vyse* v. *Foster*, L. R. 7 H. L. 318; *Travis* v. *Milne*, 9 Ha. at p. 149.
[2] *Brown* v. *De Tastet*, Jac. 284; see Art. 38, above.
[3] Per Lord Cairns, *Vyse* v. *Foster*, L. R. 7 H. L. at p. 336.

has seldom or never been known to produce any real benefit to the parties who obtained it.[1]

What Interest given.

Where interest is given, it is generally simple interest at 5 per cent. It does not appear that a partner, as such, is ever charged with compound interest in these cases. A trustee-partner may, in his quality of trustee, be charged with compound interest at 5 per cent., if the retention of the fund in the hands of the firm, even as a loan, was a distinct and specific breach of trust.[2]

Surviving Partner not a Trustee — Statute of Limitation.

A surviving partner is sometimes said to be a trustee for the deceased partner's representatives in respect of his interest in the partnership; but this is a metaphorical and inaccurate expression. The claim of the representatives against the surviving partner is in the nature of a simple contract debt, and is subject to the Statute of Limitation, which runs from the deceased partner's death. The receipt of a particular debt due to the firm after six years have elapsed from that date does not revive the right to demand a general account.[3]

ARTICLE 62

Rules for Distribution of Assets on final Settlement of Accounts.

In settling accounts between the partners, after a dissolution of partnership, the following rules

[1] Lindley, ii. 1049, *n*
[2] As in *Jones* v. *Foxall*, 15 Beav. 388.
[3] *Knox* v. *Gye*, L. R. 5 H. L. 656, see per Lord Westbury.

are to be observed (subject, as to the payments to partners, to any special agreement):

Losses are to be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually.

The assets of the firm are to be applied in the following manner and order:

1. In paying the debts and liabilities of the firm to persons who are not partners therein.

2. In paying to each partner ratably what is due from the firm to him for advances as distinguished from capital.

3. In paying to each partner ratably what is due from the firm to him in respect of capital.

4. The ultimate residue, if any, is divisible among the partners in the proportion in which profits are divisible under the partnership contract.[1]

[1] Almost verbally from Lindley, i. 827.

PART III.

PROCEDURE AND ADMINISTRATION.

CHAPTER IX.

PROCEDURE IN ACTIONS BY AND AGAINST PARTNERS.

ARTICLE 63.

Partners may sue and be sued in Name of Firm.

"Any two or more persons claiming or being liable as copartners may sue or be sued in the name of their respective firms, if any; and any party to an action may, in such case, apply by summons to a Judge for a statement of the names of the persons who are copartners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct."[1]

Sole Trader under Firm Name.

The Rules of June, 1876, also provide for the case of

[1] Rules of the Supreme Court, Order XVI. r. 10. Whether the trustee of a bankrupt partner, suing with the solvent partners under s. 105 of the Bankruptcy Act, 1869 (Art. 74, below), can now use the name of the firm, *quære.*

"one person carrying on business in the name of a firm apparently consisting of more than one person" being sued in the firm name. The writ may be served at the principal place of business in the same way as under Order IX. r. 6 (Art. 65, below; Order IX. r. 6 *a*). The person sued is to appear in his own name, but subsequent proceedings continue in the name of the firm. Order XII. r. 12 *a*.

ARTICLE 64.

Discovery of Individual Partners in Action against Firm.

"When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, declare forthwith the names and places of residence of all the persons constituting the firm. And, if the plaintiffs or their solicitor shall fail to comply with such demand, all proceedings in the action may, upon an application for that purpose, be stayed upon such terms as the Court or a Judge may direct. And, when the names of the partners are so declared, the action shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as the plaintiffs in the writ. But all proceedings shall, nevertheless, continue in the name of the firm."[1]

[1] Order VII. r. 2.

Article 65.

Service of Writ in Action against Firm.

Where partners are sued in the name of their firm, the writ" may "be served either upon any one or more of the partners, or, at the principal place within the jurisdiction of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there."

Subject to compliance in other respects with the Rules of Court, such service is good service upon the firm.[1]

Article 66.

Appearance of Partners individually.

"Where partners are sued in the name of their firm, they shall appear individually in their own names. But all subsequent proceedings shall, nevertheless, continue in the name of the firm."[2]

Article 67.

Execution upon Judgment against the Firm.

"Where a judgment is against partners in the

[1] Order IX. r. 6. Service under this rule is not allowed in actions under the Bills of Exchange Act, 18 & 19 Vict c. 67, as to which the former procedure is continued by Order II. r. 6, and must still be strictly observed. *Pollock* v. *Campbell*, 1 Ex. D. 50.

[2] Order XII. r. 12.

name of the firm, execution may be issued in the manner following:

"*a.* Against any property of the partners as such.

"*b.* Against any person who has admitted on the pleadings that he is, or has been, adjudged to be a partner.

"*c.* Against any person who has been served as a partner with the writ of summons and has failed to appear.

"If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave so to do; and the Court or Judge may give such leave if the liability be not disputed; or, if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined."[1]

The new Procedure does not recognize the Firm as a distinct Person.

These rules, it will be observed, do not introduce anything that amounts to the recognition of the firm as an artificial person distinct from its members. They allow the name of the firm to be used for the purpose of making

[1] Order XLII. r. 8.

procedure quicker and easier; and creditors of a firm have now the great practical convenience of being able to pursue their claims, even to judgment, without first ascertaining who all the partners are. The substantive results, however, are the same as under the former practice. Actions between a firm and one of its own members, or between two firms having a common member, which are allowed by the law of Scotland,[1] remain, it is conceived, inadmissible in England; and a judgment against a firm has precisely the same effect that a judgment against all the partners had formerly.

[1] See Second Report of Mercantile Law Commission, p. 18, and Appendix B thereto, p. 141; Bell, Principles of Law of Scotland, § 357.

CHAPTER X.

PROCEDURE IN BANKRUPTCY AGAINST PARTNERS.

ARTICLE 68.

Consolidation of Proceedings under joint and separate Petitions.

"Where two or more bankruptcy petitions are presented against the same debtor, or against debtors being members of the same partnership, the Court may consolidate the proceedings, or any of them, upon such terms as the Court thinks fit."[1]

ILLUSTRATION.

A and B are partners in trade, A being the sole managing partner. C, a creditor of the firm, presents a bankruptcy petition against A alone. Before the hearing of this petition C presents another petition against A and B jointly. The Court will consolidate the proceedings under the separate petition with those under the joint petition.[2]

ARTICLE 69.

Creditor of Firm may present Petition against one Partner.

"Any creditor whose debt is sufficient to en-

[1] Bankruptcy Act, 1869 (32 & 33 Vict. c. 71); s. 80, sub-s. 2.
[2] *Ex parte Mackenzie*, 20 Eq. 758.

title him to present a bankruptcy petition against all the partners of a firm may present such petition against any one or more partners of such firm without including the others."[1]

Article 70.

Court may dismiss Petition as to some Respondents only.

"Where there are more respondents than one to a petition, the Court may dismiss the petition as to one or more of them, without prejudice to the effect of the petition as against the other or others of them."[2]

Article 71.

One Trustee for Property of Partners in one Firm separately Bankrupt.

"Where one member of a partnership has been adjudicated a bankrupt, any other petition for adjudication against a member of the same partnership shall be filed in, or transferred to, the Court in which the first-mentioned petition is in course of prosecution; and, unless the Court otherwise directs, the property of such last-mentioned member shall vest in the trustee appointed in respect of the property of the first-mentioned member of the partnership, and the

[1] Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 100.
[2] *Ib.* s. 101.

Court may give such directions for amalgamating the proceedings in respect of the properties of the members of the same partnership as it thinks just."[1]

Article 72.

Creditor of Firm may prove in separate Bankruptcy for Purpose of voting.

"If one partner of a firm is adjudged bankrupt, any creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, may prove his debt, for the purpose of voting at any meeting of creditors, and shall be entitled to vote thereat, but shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts."[2]

Article 73.

Dividends of joint and separate Properties generally declared together.

"Where joint and separate properties are being administered, dividends of the joint and separate properties shall, subject to any order to the con-

[1] Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 102. When a trustee of the joint estate is duly appointed, the separate estates also vest in him at once. *Ex parte Philps*, 19 Eq. 256; *Re Waddell's Contract*, 2 Ch. D. 172; and see *Ebbs* v. *Boulnois*, 10 Ch. 479.

[2] *Ib.* s. 103. As to the distribution of the estates, see, further, Articles 75–78, below.

trary that may be made by the Court on the application of any person interested,[1] be declared together; and the expenses of, and incident to, such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for, and the benefit received by, each property."[2]

ARTICLE 74.

Actions by Trustee and solvent Partners.

"Where a member of a partnership is adjudged bankrupt, the Court may authorize the trustee, with consent of the creditors certified by a special resolution,[3] to commence and prosecute any action[4] in the names of the trustee and of the bankrupt's partner; and any release by such partner of the debt or demand to which the action[4] relates shall be void; but notice of the application for authority to commence the action[4] shall be given to such partner, and he may show

[1] As in *Ex parte Dickin*, 20 Eq. 767; see Illust. 3 to Art. 79, below.

[2] Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 104.

[3] Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 105. A special resolution must be decided by a majority in number and three-fourths in value of the creditors present, personally or by proxy, at the meeting and voting on such resolution (s. 16, sub-s. 8).

[4] The following words, "or suit," in the text of the Act, are omitted as inapplicable to the present procedure of the Supreme Court under the Judicature Acts. They may still be applicable, however, to the procedure of some local Courts.

cause against it, and, on his application, the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action,[1] and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof, as the Court directs."[2]

[1] Note 4, supra.
[2] Note 3, supra.

CHAPTER XI.

ADMINISTRATION OF PARTNERSHIP ESTATES.

ARTICLE 75.

General Rule of Administration as to joint and separate Estate.

In the administration by the Chancery Division of the High Court of Justice of the estates of deceased partners, and in the administration by the Court of Bankruptcy of the estates of bankrupt and insolvent partners, the following rules are observed:

The partnership property is applied as *joint estate* in payment of the debts of the firm,[1] and the separate property of each partner is applied as *separate estate* in payment of his separate debts.

After such payment, the surplus, if any, of the joint estate is applied in payment of the separate debts of the partners; or the surplus, if any, of the separate estate is applied in payment of the debts of the firm.

[1] That is, to persons other than partners, see Art. 78.

ILLUSTRATIONS.

1 A and B are in partnership. A dies, and his estate is administered by the Court. Both A's estate and B are solvent. Here A's separate creditors and the creditors of A and B's firm may prove their debts against A's estate and be paid out of his assets *pari passu* and in the same manner. The payments thus made to creditors of the firm must then be allowed by B, in account with A's estate, as payments made on behalf of the firm, and A's estate will be credited accordingly in ascertaining what is A's share of the partnership property.[1]

2. The facts being otherwise as in the last illustration, A's estate is insolvent, and the creditors of the firm proceed to recover the full amount of their debts from the solvent partner, B. Here B will become a creditor of A's separate estate for the amount of the partnership debts paid by B beyond the proportion which he ought to have paid under the partnership contract.[2]

3. If B is also insolvent, the creditors of the firm must resort in the first instance to the partnership property, and can only come against so much of the separate property of the partners as remains after paying their separate creditors respectively; and the same rule applies if both A and B have died before the administration takes place.[3]

4. A and B are partners. A dies, and B afterwards becomes bankrupt. M, a creditor of the firm, proves his debt in B's bankruptcy, and receives some dividends which satisfy it only in part. A's estate is administered by the Court, and M proves in that administration for the residue of his debt. Separate creditors of A also prove their debts. M has no claim upon A's estate until all the separate creditors of A have been paid.[4]

5. A and B are partners under articles which provide that, in the event of A's death during the partnership, B's interest in the profits shall thenceforth belong to A's representatives, B receiving a sum equivalent to his share of profits for six

[1] *Ridgeway* v. *Clare*, 19 Beav. at p. 116.
[2] *Ib.*
[3] *Ib.* at pp. 116, 117.
[4] *Lodge* v. *Prichard*, 1 D. J. S. 610.

months, to be ascertained as therein provided, and the amount of his capital. A dies, having appointed B his executor. B carries on the business for some time, and then becomes a liquidating debtor. The partnership property existing at the date of A's death is not converted into A's separate property by the provisions of the partnership articles, and such property, so far as it is still found in B's hands at the time of liquidation, is applicable in the first instance as joint estate to pay the creditors of the firm.[1]

6. A and B are partners for a term, A not having brought in any capital, but receiving a share of the profits as a working partner. The partnership deed provides that, if A dies during the term, his representatives shall receive only an apportioned part of his estimated share in the profits for the current half year. A dies during the term, and B afterwards becomes bankrupt. Here B takes the partnership property subject to the right of A's estate to be indemnified against the partnership debts, and the property of the firm of A and B, so far as it is found still existing in B's hands, must be first applied to pay the creditors of the firm.[2]

7. A, B, C, and D are partners for a term, under articles which provide that the death of any one of them shall not dissolve the partnership, but the survivors or survivor shall carry on the business, and the share of the deceased partner shall be ascertained and paid out as therein provided. A and B die during the term, and afterwards C and D become liquidating debtors. Here, as the interest of a deceased partner wholly passes to the survivors on his death, under the special and exceptional provisions of the partnership articles, the creditors of the original firm of A, B, C, and D have no right to have the property of that firm, so far as it is found still existing in the hands of C and D, applied in payment of their debts in preference to the creditors of the new firm of C and D.[3]

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[1] *Ex parte Morley*, 8 Ch. 1026.
[2] *Ex parte Dear*, 1 Ch. D. 514.
[3] *Re Simpson*, 9 Ch. 572. This was a peculiar case. The last three Illustrations really belong to Art. 30 (which see) as much as to this, but it seemed, on the whole, more convenient to give them here.

Dicta *laying down the Rule.*

This rule has been repeatedly laid down in its general form as a well-established one.

"Upon a joint bankruptcy or insolvency, the joint estate is the fund primarily liable, and the separate estate is only brought in in case of a surplus remaining after the separate creditors have been satisfied out of it." [1]

"The joint estate is to be applied in payment of the joint debts, and the separate estate in payment of the separate debts, any surplus there may be of either estate being carried over to the other;" and this applies to the administration of estates in Equity as well as in Bankruptcy.[2]

"The joint estate must be applied first in payment of joint creditors, and the separate estate in payment of separate creditors, and only the surplus of each estate is to be applied in satisfaction of the other class of creditors." [3]

The subject was also carefully considered by Lord Romilly in *Ridgway* v. *Clare.*[4] The rules laid down by him for the various cases which may occur have been given above in the form of illustrations.

The Bankruptcy Rules of 1870 contain, in accordance with these principles, the following provision (Rule 76):

[1] *Rolfe* v. *Flower*, L. R. 1 P. C. at p. 48.

[2] *Lodge* v. *Prichard*, 1 D. J. S. at pp. 613, 614, per Turner, L. J. The Supreme Court of Judicature Act, 1875, s. 10, assimilates the rules of administration of deceased persons' estates to those "in force for the time being under the Law of Bankruptcy with respect to the estate of persons adjudged bankrupt;" apart from this enactment, however, the practice was already so settled on the point now in question.

[3] *Ex parte Dear*, 1 Ch. D. at p. 519, per James, L. J. *Ex parte Morley*, 8 Ch. at p. 1032.

[4] 19 Beav. 111.

Bankruptcy Rules of 1870 as to Administration.

"Any separate creditor of any bankrupt shall be at liberty to prove his debt under any adjudication of bankruptcy made against such bankrupt jointly with any other person or persons. And under every such adjudication distinct accounts shall be kept of the joint estate, and, also, of the separate estate or estates of each bankrupt, and the separate estate shall be applied in the first place in satisfaction of the debts of the separate creditors. And, in case there shall be an overplus of the separate estate, such overplus shall be carried to the account of the joint estate. And, in case there shall be an overplus of the joint estate, such overplus shall be carried to the account of the separate estates of each bankrupt, in proportion to the right and interest of each bankrupt in the joint estate. And the cost of taking such accounts shall be paid out of the joint and separate estates, respectively, as the court shall direct."

The Rules also provide as follows for dealing with partnership estates in liquidation by arrangement or composition:

As to Partnership Estates in Liquidation or Composition.

285. "In cases of proceedings for liquidation by arrangement or composition, instituted by partners, separate meetings of the different classes of creditors shall be held; thus, if the partnership consists of A, B, and C, a meeting of the joint creditors of A, B, and C shall be first held at a date or time subsequent to the meeting of the partnership creditors. The joint creditors may come to such resolution as they may think fit with regard to the joint estate. The separate creditors may also come to such resolution as they may think fit as regards the liquidation of the estate of their individual debtor, but, in the event of their determining upon his bankruptcy, or the liquidation of his estate by arrangement, they shall choose the same trustee, if any, as has been or shall be appointed by the joint or partnership creditors, but they may appoint a com-

mittee of inspection from their own body, if they think fit, or they may adopt the committee (if any) appointed by the joint or partnership creditors. In the event of the separate creditors of any such debtor agreeing to accept a composition in cases where the joint creditors have resolved on a liquidation by arrangement, the assets of such separate debtor shall be made available by the trustees for or towards the payment thereof in such manner as the court shall direct and approve, and any surplus of such separate estate remaining in the hands of the trustee after payment of, or provision for, such composition, and all proper costs incurred in connection therewith, shall be deemed partnership assets. If in any such case the separate debtor shall be a member of more than one firm, the surplus of his separate estate shall be applied in such manner as the court may direct."

286. "If the petition be by partners, and any two or more of such partners constitute a separate and independent firm, the creditors of such firm may likewise come to a separate resolution as regards the liquidation of such minor partnership estate; and, where any surplus shall arise upon the liquidation thereof, the same shall be carried over to the separate estates of the partners in such minor firm according to their respective rights therein."

287. "In cases of proceedings for or towards liquidation by arrangement or composition by an individual debtor, his creditors and debts shall be deemed to be and include not only those creditors to whom, or those debts in respect of which, he is individually responsible, but also those creditors and debts to whom or in respect of which, he is also responsible jointly with any other person or persons; and the statutory majority required for the purpose of any resolution shall be a collective majority of the whole of such joint and separate creditors assembled at any meeting. In any such last-mentioned proceedings the terms of the resolution as regards joint and separate creditors need not be identical, and, if so desired, the resolution may provide for the payment of a composition to the separate creditors, and that the rights of the joint creditors shall not be prejudiced or affected thereby."

Rule of Indian Contract Act.

The Indian Contract Act (s. 262) gives the rule as follows:

"Where there are joint debts due from the partnership, and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm; and, if there is any surplus, then the share of each partner must be applied in payment of his separate debts, or paid to him. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm." This section is general in its terms, and not confined to the administration of partners' estates by the Court. It seems intended to cover the doctrine of *partners' lien*, to which we have given a distinct place (Art. 56, above).

The Rule empirical and doubtful in Principle — Mercantile Plan of Administration.

The rules of administration as between the creditors of the firm and the separate creditors of the partners have been settled and adhered to, after much hesitation, in the earlier cases, as "a sort of rough code of justice,"[1] and as an empirical way of dealing with a pressing necessity, rather than as being reasonable in themselves.[2] They give, in fact, results altogether at variance with the mer-

[1] Per James, L. J., *Lacey* v. *Hill*, 8 Ch. at p. 444

[2] "It is extremely difficult to say upon what the rule in Bankruptcy is founded," per Lord Eldon, *Gray* v. *Chiswell*, 9 Ves. at p. 126; to the like effect in *Dutton* v. *Morrison*, 17 Ves. at p. 211; see, too, *Lodge* v. *Prichard*, 1 D. J. S. 613, per Turner, L. J. Story (on Partnership, §§ 377, 382) says that it "rests on a foundation as questionable and unsatisfactory as any rule in the whole system of our jurisprudence." Kent, on the other hand (Comm. 3, 65), thinks it, on the whole, a reasonable one.

cantile system of settling the accounts of a firm, which proceeds upon the mercantile conception of the firm as a person distinct from its partners. On the mercantile plan the debts of the partners to the firm, as ascertained on the ordinary partnership accounts, are payable on the same footing as their other debts; and, if this rule were applied by the Court, the joint estate might prove against the separate estate of any partner in competition with the separate creditors for the balance due from him to the firm. The creditors of the firm would thus be in a far better position than they are at present. As it is, the partners may have considerable separate property, and be largely indebted to the firm, and yet their separate creditors may be paid in full, while the creditors of the firm get hardly anything.[1]

Law of Scotland.

The law of Scotland does not treat the firm as a separate person, and so far agrees with the usage of merchants; but on the point now before us it differs from the mercantile scheme of accounts as well as from the law of England. The rule is that, "upon the sequestration of copartners, their separate estates are applicable to the payment *pari passu* of their respective separate debts, and of so much of the partnership debts as the partnership estate is insufficient to satisfy. The creditor in a company [partnership] debt, in claiming upon the sequestered estate of a bankrupt partner, must deduct from the amount of his claim the value of his right to draw payment from the company's funds, and he is ranked as a creditor only for

[1] See the extract from Cory on Accounts given in Lindley, ii 1204.

the balance."[1] This is less favorable to partnership creditors than the mercantile rule, though more so than the English rule, and it is more complicated in working than either. The English rule was preferred to the Scottish by most of the persons and bodies who returned answers to the Mercantile Law Commission; whereas, on the other matters of difference between the partnership law of the two countries, the opinions given were almost unanimous in favor of the law of Scotland.

In France no express directions on this point are given by the Civil or Commercial Code. The prevailing opinion seems to be that the creditors of the firm have a prior claim on the partnership property, and may also come upon the separate property in competition with the separate creditors.[2]

The German Commercial Code (Art. 122) makes the joint estate (Gesellschaftsvermögen) applicable in the first instance to pay the debts of the firm; the rights of joint and separate creditors respectively against the separate estates are left to be dealt with by the municipal laws (Landesgesetzen) of the several German States.

ARTICLE 76.

Exceptional Rights of Proof in certain Cases — When Creditors of Firm may prove against separate Estate.

Notwithstanding the last foregoing Article, a creditor of the firm may prove his debt in the

[1] Second Report of Mercantile Law Commission, Appendix A, p. 99. It must be remembered that in Scotland the firm can be bankrupt without the partners being bankrupt.

[2] Troplong, Droit Civ. Expl., Contrat de la Société, tom. 2, nos. 857-863; Sirey, Codes Annotés, on Code Civ. 1864, nos. 10-12.

first instance against the separate estate of a partner in any of the following cases: [1]

1. Where that partner only is bankrupt, and has been made bankrupt on the petition of such creditor.[2]

2. Where, the firm being bankrupt, there is no joint estate, or where, one partner only being bankrupt, there is no joint estate, and no living[3] solvent partner,[4] known as such to the creditor when the debt was contracted,[5] and resident within the jurisdiction of the Court.[6]

ILLUSTRATION.

A firm becomes bankrupt. The whole property of the firm amounts to £13 *4s. 5d.* in value, and will be exhausted by the costs of administration. The creditors of the firm cannot prove against the separate estates of the partners in competition with their separate creditors, inasmuch as there is *some* joint estate.[7]

[1] These rules are artificial (see Story on Partnership, §§ 379, 380), and the second, as shown by the illustration, is capricious in operation. No special notice is taken of them in the Bankruptcy Act, 1869, or the Rules thereunder; and the recent writers on the Law of Bankruptcy have expressed doubt whether effect would now be given to them. Mr. Justice Lindley, however, states the Rules without remark, in his last edition.

[2] Lindley, ii. 1233.

[3] *Ex parte Bauerman*, 3 Deac. 479.

[4] Lindley, ii. 1234.

[5] The proof is not excluded by the fact of there being a *dormant* partner who is solvent, see 19 Ves. 294.

[6] Proof has also been admitted where there was a solvent partner abroad and "not likely to return." *Ex parte Pinkerton*, 6 Ves. 814, *n.*

[7] *Ex parte Kennedy*, 2 D. M. G. 228, following *Ex parte Clay*, *Ib.* 230, *n.*, where the existence of joint estate consisting of an old stool and map worth *3s. 6d.*, and a bad debt, was held to exclude the right of separate proof.

ARTICLE 77.

Where joint Estate may prove against separate Estates or Estate of minor Firm.

Notwithstanding Article 75, the trustee of the joint estate of a bankrupt firm may prove [1] against the separate estate of any partner, or the joint estate of any distinct firm composed of, or including, any of the partners in the principal firm, debts arising out of either of the following states of fact:

1. Where that partner or distinct firm has dealt with the principal firm in a business carried on by such partner or distinct firm as a separate and distinct trade, and the principal firm has become a creditor of such partner or distinct firm in the ordinary way of such dealing.[2]

2. Where that partner has fraudulently converted partnership property to his own use [3] without the consent or subsequent ratification of the other partner or partners.[4]

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[1] That is, on behalf of the creditors of the firm.
[2] Lindley, ii. 1239.
[3] *Ib.* 1236.
[4] The comparison of *Ex parte Harris*, 2 V. & B. 210, and 1 Rose, 437, with *Ex parte Yonge*, 3 V. & B. 31, 2 Rose 40, and the judgment of the M. R. in the late case of *Lacey* v. *Hill*, *Bailey's Claim* (not yet reported), seem to give this as the true form of the rule. For further remarks see on Art. 78 below. Lord Eldon's own terms, several times repeated in *Ex parte Harris*, are, "knowledge, consent, privity, or subsequent approbation." I have ventured to act on the Master of the Rolls'

ILLUSTRATIONS.

1. A, B, C, D, and E are bankers in partnership at York, and A, B, C, and D are bankers in partnership at Wakefield. A balance is due to the York firm from the Wakefield firm on account of dealings between the two banks in the ordinary course of banking business. The York firm, and, therefore, also the Wakefield firm, becomes bankrupt. The trustee of the York firm may prove against the estate of the Wakefield firm for this balance.[1]

2. A and B become partners from the 1st of January. Under the articles all partnership moneys are to be paid into their joint names at a particular bank, and each partner may draw out £50 a month for his own use. An account is opened at the bank in the joint names of A and B, and partnership moneys are paid into it. On the 1st of February A draws out £550 instead of £50, without the knowledge of B, and the firm shortly afterwards becomes bankrupt. The trustee of the joint estate may prove against A's separate estate for £500.[2]

3. A and B are partners under articles which provide that money received by either of them on the partnership account shall be paid monthly into a certain bank, and that each partner may draw out £50 per month for his own use. A is the acting partner, and with the knowledge of B pays the money received by him on the partnership account into his private account at his own banker's, and B himself pays some partnership moneys into A's account. A draws on the partnership funds so standing to his own account beyond the amount permitted by the articles, and also retains other partnership funds in his hands, and applies them to his own use without ever paying them in. The firm becomes bankrupt. The trustee of the joint estate cannot prove against the separate estate of A for the moneys drawn out in excess or not paid in, as B has by his conduct allowed A to have the sole dominion over the part-

intimation, in *Lacey* v. *Hill*, that fewer words would probably have done as well. I am indebted to the kindness of my friend Mr. Dundas Gardiner, for the opportunity of consulting the judgment in this last case.

[1] *Ex parte Castell*, 2 Gl. & J. 124.

[2] Per Lord Eldon, *Ex parte Harris*, 2 V. & B. at p. 214.

nership funds, and must be taken to have consented to the unlimited exercise of that dominion.[1]

4. [A and B are partners, A being the sole acting partner. A pays out of the partnership property private debts of his own, and other debts for which, under the provisions of the partnership articles, not the firm, but A separately, is liable. The firm afterwards becomes bankrupt. The trustee of the joint estate cannot prove for the amount of these debts against the separate estate of A, since A's conduct does not amount to a *fraudulent* conversion of partnership property to his own use.[2]]

5. A, B, and C are partners in a bank, A being the sole managing partner. A draws large sums from the funds of the bank by means of fictitious credits and forged bills, and thereby conceals from B and C (who trust A's statements without making further enquiry) the fact that he has overdrawn his private account in contravention of the partnership articles. A dies, and shortly afterwards B and C become bankrupt. The trustee of B and C's joint estate may prove against A's estate for the amount of the partnership moneys misapplied by him.[3]

ARTICLE 78.

Rule against Proof by Partners in Competition with Creditors.

Where the joint estate of a firm or the separate

[1] *Ex parte* Harris, 2 V. & B. 210, and less fully in 1 Rose, 437. "The necessary effect of the transaction being to give the dominion over the whole fund to one, . . . the other must be taken to have consented to that dominion;" 2 V. & B. at p. 215.

[2] *Ex parte Lodge and Fendal*, 1 Ves. Jr. 166, and see 2 V. & B. 211, *n*, and Cooke's Bankrupt Laws (8th Ed.), 530. The opinion of the Court was at first the other way, and the case has been considered one of great hardship; see the judgment in *Ex parte Yonge*, 3 V. & B. 31, 34, 2 Rose, 40. It is difficult to understand the real grounds of the decision, from the report itself; but it must now be taken that the case was one of the same class as *Ex parte Harris;* see the comments on it in the judgment there, 2 V. & B. at p. 213; and *Ex parte Hinds*, 3 De G. & Sm. at p. 615.

[3] *Lacey* v. *Hill*, *Bailey's Claim*, W. N. 1876, 232; affirmed on appeal, *Ib.* 262. The case is now under appeal to the House of Lords.

estate of any partner is being administered, no partner in the firm may prove, in competition with the creditors of the firm, either against the joint estate of the firm [1] or against the separate estate of any other partner,[2] until all the debts of the firm have been paid.

Exceptions in special Circumstances.

Exceptions. — Partners may nevertheless prove against the joint estate of the firm or the separate estate of a partner, as the case may be, for debts which have arisen under any of the following states of fact:

1. Where two firms having one or more members in common, or a firm and one of its members, have carried on business in separate and distinct trades, and dealt with one another therein, and the one firm or trader has become a creditor of the other in the ordinary way of such dealing.[3]

2. Where the separate property of a partner has been fraudulently converted to the use of the firm,[4] or property of the firm has been fraudulently converted to the use of any partner,[5] without the consent or subsequent ratification of

[1] Lindley, ii. 1224.
[2] *Ib.* 1239.
[3] Lindley, ii. 1228, 1240.
[4] Per Lord Eldon, *Ex parte Sillitoe*, 1 Gl. & J. 382.
[5] Lindley, ii. 1236.

the partner or partners not concerned in such conversion.[1]

3. Where, having been bankrupt, a partner has been discharged, and has afterwards become a creditor of the firm[2] [or of another partner[3]].

ILLUSTRATIONS.

1. A, B, and C are partners under articles which provide that, if any partner dies, his share shall be taken by the surviving partners at its value according to the last stock-taking, with interest at 5 per cent. on its amount in lieu of profits up to the day of his death, and shall be paid out by instalments. A dies, and after his death, and before the ascertained value of his share has been paid to his executors, B and C become bankrupt. A's executors cannot prove against the joint estate of the firm for the amount due to them in respect of A's share till all other debts of the firm contracted during A's lifetime are paid.[4]

2 If, the other facts being as in the last illustration, all debts of the firm contracted in A's lifetime have been paid before the bankruptcy, A's executors may prove for the full amount; for here they are not competing with any creditor of A.[5]

3. A and B are partners. The partnership is dissolved by agreement, A giving B a bond for £10,000 and interest, and B transferring to A all his interest in the partnership. A and a third person, C, also covenant to pay the debts of the firm. A becomes bankrupt. B assigns his separate property to trustees for the benefit of the creditors of the firm. The trustees under this assignment cannot prove the bond debt against A's estate until all the debts of the firm are paid, or unless the creditors

[1] See Note 4, p. 138, above.
[2] Lindley, ii. 1227.
[3] This case would presumably follow the analogy of the other.
[4] *Nanson* v. *Gordon*, 1 App. Ca. 195, affg. s. c. nom. *Ex parte Gordon*, 10 Ch. 160.
[5] *Ex parte Edmonds*, 4 D. F. J. 488. The fact that the joint debts had been paid appears by the head-note.

of the firm accept the assignment of B's property as payment in full, and release the joint liability of A and B.[1]

4. A and B are partners. The firm becomes bankrupt. Before the bankruptcy, A is indebted to B upon a contract independent of the partnership. It is known that there will be no surplus of A's separate estate after satisfying his separate debts, whether B's debt is admitted to proof or not. B may prove his debt against A's separate estate, as he does not thereby compete with any creditor of the firm.[2] It is doubtful whether he might so prove it if A's separate estate were solvent.[3]

5. A and B are traders in partnership, A being a dormant partner. They dissolve the partnership by agreement, and B takes over the business of the firm, and is treated by its creditors as their sole debtor. On the dissolution an account is stated between A and B, which shows a balance due to A. Afterwards A sues B for the amount, the action is undefended, and A signs judgment for the debt and costs. Some time after this, B becomes bankrupt. A can prove this debt in B's bankruptcy, as it is a purely separate debt, in respect of which there can be no competition between A and the creditors of the firm.[4]

6. A and B are partners. A also carries on a separate trade on his own account, and in that trade sells goods to the firm of A and B. The firm of A and B becomes bankrupt. A may prove against the joint estate for the balance due on the dealings between A in his separate business and the firm of A and B.[5]

7. A, B, C, and D are bankers in partnership, under the firm of C & Co. A and B are ironmongers, under the firm of A & Co. A and B endorse, in the name of A & Co., bills remitted to them by C & Co., and procure them to be discounted on the credit of such endorsement; they also draw bills in the name

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[1] *Ex parte Collinge*, 4 D. J. S. 533.
[2] *Ex parte Topping*, 4 D. J. S. 551.
[3] *Lacey* v. *Hill*, 8 Ch. 441, 445.
[4] *Ex parte Grazebrook*, 2 D. & Ch. 186. This is probably the extreme case in which proof has been allowed, and seems open to grave doubt.
[5] *Ex parte Cook*, Mont. 228.

of A & Co. for the use of C & Co. The firm of C & Co. becomes bankrupt. A and B cannot prove against the joint estate for the balance due to them on these transactions, as their dealings with C & Co were not in the course of their separate trade, but only "for the convenience of the general partnership."[1] The same rule applies even if A & Co. are bankers.[2]

8. A, B, and C are bankers in partnership. C, the managing partner, becomes bankrupt. A balance is due from him to the firm on the partnership account, and he has also obtained large sums of money on bills drawn and endorsed by him in the name of the firm, and applied such moneys to his own use, and A and B have been compelled to take up the bills. A and B, having paid all the debts of the firm existing at the date of the bankruptcy, may prove in C's bankruptcy for the amount thus received and misapplied by him.[3]

9. A and B are partners, under articles which provide that, if A dies during the partnership, B's share in the business shall belong to A's representatives. A dies during the partnership, having appointed B and others his executors. B is the sole acting executor, and continues the business. He receives income of the separate property of A, and employs it in the business without authority. A's estate is insolvent, and is administered by the Court. B becomes bankrupt, and the joint estate of the late firm is administered in the bankruptcy. The receiver of A's estate may prove in the bankruptcy of B for the moneys misapplied by B as A's executor.[4]

10. A firm becomes bankrupt. One of the partners obtains his discharge, and afterwards takes up notes of the firm. He may prove for their amount against the joint estate.[5]

Principles of exceptional Right of Proof where Property has been wrongfully converted to the Use of the Firm or of a Partner.

The exceptional right of proof in cases where there has

[1] *Ex parte Sillitoe*, 1 Gl. & J. 374.
[1] *Ex parte Maude*, 2 Ch. 550.
[3] *Ex parte Yonge*, 3 V. & B. 31, and 2 Rose, 40.
[4] *Ex parte Westcott*, 9 Ch. 626.
[5] *Ex parte Atkins*, Buck, 479.

been a wrongful conversion of partnership property to the use of one partner, or *vice versa*, is established by comparatively early authorities which settle the principle, but are not very clear in their language, and leave sundry questions open as to the limits of the rule. It is somewhat unfortunate that *Ex parte Lodge and Fendal*[1] acquired the reputation of being a leading case on the subject; for the facts are not stated in sufficient detail, and the ultimate decision is nowhere fully reported. The real leading case appears rather to be *Ex parte Harris*,[2] which was in fact so treated in *Lacey* v. *Hill*, *Bailey's Claim*.[3]

The judgment of the Master of the Rolls in this last case deals with the whole question, and greatly lessens the difficulty of giving a complete and exact statement of the law.

The points specially considered were the following:

Fraud in strict Sense need not be proved.

First, what is a fraudulent conversion of partnership property to a partner's separate use[4] within the meaning of the rule? A wilfully dishonest intention, or conduct which, in the language of Lord Eldon, adopted by the Master of the Rolls, amounts to *stealing* the partnership property, is generally found to be present in these cases, but it need not be proved in every case.

"It is not, as I understand it," said the Master of the Rolls, "necessary for the joint estate[4] to prove more than,

[1] 1 Ves. Jr. 166, see p. 140, above.
[2] 2 V. & B. 210.
[3] W. N. 1876, 232, 262; see p. 140, above.
[4] Everything here said is equally applicable, of course, to the converse case, which, however, is in practice very rare, if indeed it occurs at all.

in the words of Lord Eldon,[1] that the overdrawing was made for private purposes, against the prohibition either express or implied in the partnership agreement, without the knowledge, consent, privity, or subsequent approbation of the other partner. That is all that is necessary to be proved; but, if that is shown, it is *prima facie* a fraudulent appropriation within the rule."

It appears, therefore, that the term fraud is used for the purposes of this rule in the wide sense formerly given to it by Courts of Equity. Lord Eldon expressly defines it to mean any taking of partnership funds which is not by contract, or loan, or with the express or implied authority of the other partner.[2]

Consent or Ratification may be by Conduct — Question of constructive Notice.

Next, what will amount to implied authority? It must be admitted that one partner may give assent by conduct as well as by words to the uncontrolled and unlimited exercise of dominion over the partnership funds by the other, and that a general assent so given may have the same effect as regards the other partner's dealings with the funds as if those dealings had been severally and specially authorized. So much is established by the decision in *Ex parte Harris*.[3] But a distinct question remains, whether the doctrine of *constructive notice* applies to these cases; in other words, whether means of knowledge on the part of the partner defrauded are equivalent to actual knowledge. If he might have discovered the misappropriation of partnership funds by using ordi-

[1] *Ex parte Harris*, 2 V. & B. at p. 214,
[2] 2 V. & B. at p. 213,
[3] 2 V. & B. 210,

nary diligence in the partnership affairs, can he be deemed to have assented to the misappropriation? or (which seems a better way of putting it) is he estopped from saying that the misappropriation was not consented to or ratified by him? There is some show of authority in favor of an affirmative answer. Lord Eldon said, in *Ex parte Yonge*,[1] "If his partners could have known that he [the acting partner] had applied it to his own purposes from their immediate or subsequent knowledge upon subsequent dealing, their consent would be implied;" a *dictum* which, though far from lucid, seems in its most natural reading to lay down the doctrine that constructive notice or means of knowledge will have the same effect as actual consent or a ratification by words or conduct founded on actual knowledge. And, in the much later case of *Ex parte Hinds*,[2] the judgment of the Commissioner, from which Knight Bruce, V.-C., did not dissent, proceeds without hesitation on this doctrine. The case was finally disposed of, however, on the ground that there was in fact no conversion at all, the investment in question, though unauthorized, having been made on the partnership account.

Decision in Lacey *v.* Hill *that Doctrine of constructive Notice is not here applicable; nor that of Estoppel by Negligence.*

The contrary doctrine, on the other hand, is distinctly and positively laid down by the Master of the Rolls in *Lacey* v. *Hill, Bailey's Claim*, and, subject to the ultimate decision of that case by the House of Lords, must now be taken to be the law. There must be, he said in effect, a

[1] 3 V. & B. at p. 36.
[2] 3 De G. & Sm. 613, 616, 617.

real consent or acquiescence; and acquiescence means, not the existence of facts which may be said to amount to constructive notice, but standing by with knowledge — actual knowledge — of one's rights. Neither can the result aimed at by the theory of constructive notice be obtained in another way by putting it on the ground of estoppel by negligence. A person who has committed gross fraud — or his creditors who stand in his place — cannot be heard to complain of the negligence of the person defrauded in not finding out the fraud sooner. The language of the judgment leaves room for the suggestion that this does not apply to a case where there is not actual fraud in the strict sense, a *stealing* of the partnership funds; so that in such a case it may still be arguable that means of knowledge will do. But a distinction of this kind between fraudulent and non-fraudulent misappropriation (*i. e.*, in the strict sense, not in the larger sense of fraud with reference to which the general rule is stated) would be most inconvenient, and there is no reason to suppose that the court would allow it And, if no such distinction exists, it is a question whether it be necessary or desirable to retain the word "fraud," or any derivative of it, in the enunciation of the rule itself.

It was further argued in *Lacey* v. *Hill* that, in order to establish the right of proof against the separate estate, it was necessary to show that the separate estate (that is, the fund available for the separate creditors) had been actually increased by the sums misappropriated. This argument, apparently a novel one, found no favor with the Court. A man's separate estate is increased by any increase of his private means; increasing his own means out of the partnership estate, whatever he does with the funds so taken, is in fact increasing his separate estate. The Court has

nothing to do with tracing the subsequent fate of the sums misappropriated; if in any particular case they could be traced and identified in a specific investment, the right of the joint estate would be of a different kind; there would be a case, not for proof, but for restitution.

ARTICLE 79.

Rights of joint Creditors holding separate Security, or conversely.

Any creditor of a firm holding a security for his debt upon separate property of any partner may prove against the joint estate of the firm, and any separate creditor of a partner holding a security for his debt upon the property of the firm may prove against such partner's separate estate, without giving up his security; provided that the creditor must in no case receive in the whole more than the full amount of his debt.[1]

Explanation. — Representations made to a creditor by the partner or partners giving him a security that the property on which the security is given is separate, or is the property of the firm, as the case may be, do not affect or extend the application of this rule.[2]

[1] *Re Plummer*, 1 Ph. 56, 60; *Rolfe* v. *Flower*, L. R. 1 P. C. at p. 46; Lindley, ii. 1219, 1220. For the general rule as to the treatment of secured debts in bankruptcy, see *Ib.* 1218, and Rule 272 of the Bankruptcy Rules of 1870.

[2] See Illustration 4.

ILLUSTRATIONS.

1. A, B, and C are partners, and open a banking account with D. The bank makes advances to the firm on the security of the joint and several promissory note of A, B, and C. Afterwards A gives the bank a mortgage of separate property of his own to secure the balance then due and future advances to a limited extent. The firm becomes bankrupt, being at the time indebted to the bank beyond the amount covered by the promissory note and mortgage respectively After realizing the mortgage security, D may prove against the joint estate upon the promissory note for the balance of the debt.[1]

2. A is in partnership with his son, B. They execute to a partnership creditor, C, a joint and several bond for his debt, and A also gives C an equitable mortgage on land which is his separate property. The partnership is afterwards dissolved. A dies intestate, and B becomes bankrupt. The partnership debts and A's other debts are of such an amount that, apart from this mortgage debt, A's estate would be insolvent. Here C may prove his debts in B's bankruptcy without giving up his security, as B has no beneficial interest in the mortgaged estate, and C's security is therefore not on B's estate.[2]

3. A and B are partners. The firm keeps a banking account with C & Co., with whom A likewise keeps a separate account. A deposits with the bank the title-deeds of separate property of his own, to secure the balance of account due or to become due from him, either alone or together with any one in partnership with him. The firm of A and B becomes bankrupt. Both the account of the firm and A's separate account are overdrawn. C & Co. may prove against the joint estate for the whole balance due from the firm to the bank, and apportion the proceeds of the security on A's property between the balance due from the firm and that due from A as they think fit, allowing for what comes to them under the proof against the joint estate.[3] C & Co. may also prove against A's separate estate for

[1] *Ex parte Bate*, 3 Deac. 358.
[2] *Ex parte Turney*, 3 M. D. & D. 576.
[3] For this purpose they may apply to the Court to have a dividend declared first on the joint estate, under r. 104 of the Bankruptcy Act, Art. 73, above.

the residue of A's separate debt to them, after deducting the apportioned part of the proceeds of the security.[1]

4. A and B are partners. A is a shareholder in a bank incorporated under the Companies Acts, which, by the articles of association, has a lien on the shares of every shareholder for debts due to the bank from him either alone or jointly with any other person. A's shares are in fact, but not to the knowledge of the bank, partnership property. The firm of A and B becomes bankrupt. The bank cannot treat these shares as A's separate property for the purpose of its lien, and cannot prove against the joint estate for the balance due from the firm of A and B without deducting the value of the shares.[2]

ARTICLE 80.

Double Proof allowed on distinct Contracts.

"If any bankrupt is, at the date of the order of adjudication, liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof[3] in

[1] *Ex parte Dickin*, 20 Eq. 767.

[2] *Ex parte Manchester and County Bank*, 3 Ch. D. 481. The reason is, according to Mellish, L. J. (at p. 487), that the question is not between the partners and the secured creditor, but between the secured creditor and the other creditors of the firm, so that the principle of estoppel does not apply. James, L. J., doubted as to the principle, and Baggallay, J. A., preferred to rest the decision on the provisions of the Bankruptcy Act as to secured creditors.

[3] The statutory right to prove carries the right to receive dividends, and is in no case merely formal; see *Ex parte Honey*, cited below.

respect of such contracts against the properties respectively liable upon such contracts."[1]

In cases not included in the foregoing rule a creditor to whom a firm is liable, and to whom its members are also severally liable for the same debt, must elect whether he will proceed as a creditor of the firm or as a separate creditor of the partners [2]

ILLUSTRATIONS.

1. A, B, and others are partners in a firm of A & Co. A joint and several promissory note is made and signed by A & Co., by A and B separately, and by other persons. Afterwards the firm of A & Co. becomes bankrupt. Here the contract of the firm and the separate contracts of A and B contained in the same note are distinct contracts within the above rule, and the holder of the note may prove against and receive dividends from both the joint estate of the firm and the separate estates of A and B.[3]

2. A and B are partners. They borrow a sum of money for partnership purposes from C, and C settles the debt upon certain trusts by a deed in which A and B jointly and severally covenant with D to pay the sum. The deed does not show that A and B are partners or that the debt is a partnership debt. The firm becomes bankrupt. Here it may be shown by external evidence that the joint contract of A and B in the deed is in fact the contract of their firm, and D may prove against the joint estate of the firm in respect of the joint covenant, and

[1] Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 37.

[2] This was the old general rule, which is now practically reduced to an exception of no great importance; Lindley, ii. 1245, 1250. The cases cited as illustrations will show that the Court is inclined to give a liberal application to the modern enactment.

[3] *Ex parte Honey*, 7 Ch. 178.

against the separate estates of A and B in respect of their several covenants.[1]

Article 81.

Application of foregoing Rules to Liquidation by arrangement.

The foregoing rules contained in this chapter for the administration of partnership estates in bankruptcy extend and apply, so far as the nature of the case admits, to the administration of such estates in the way of liquidation by arrangement.[2]

Article 82.

Effect of separate Discharge of Partner.

Where the discharge of any member of a partnership firm is granted to him in his separate bankruptcy, or in the separate liquidation by arrangement of his affairs, he is thereby released from the debts of the firm, as well as from his separate debts.[3]

[1] *Ex parte Stone*, 8 Ch. 914.
[2] Bankruptcy Act, 1869, s. 125, sub-s 7; and see the Rules cited above on Art. 75.
[3] *Ex parte Hammond*, 16 Eq. 614.

ADDENDA.

Page 7. *Pooley* v. *Driver*, the most important decision yet given on the Act to amend the Law of Partnership, 28 & 29 Viet. c. 86 is now reported in 25 W. R. 162. The judgment appears to have proceeded to some extent upon special provisions of the contract not mentioned in the Weekly Notes, which gave the nominal lenders an amount of control over the business, by means of powers to withdraw their capital and otherwise, inconsistent with the transaction being a real loan. The documents indicated "the intention to advance money, not by way of loan, but for the purposes of the business; it was, in fact, an advance or contribution of the capital of the partnership." "It was not the intention of the Act that persons should be enabled to hold the position of dormant partners and yet be free from liability. The defendants certainly did not intend to be liable as partners, but they did intend to be partners in the sense of exercising a control over the business. To entitle a person to the protec-

tion of the Act he must be a real lender. His advance must be a real loan, and not a contribution of capital professing to be a loan."

The Master of the Rolls also expressed a clear opinion that the Act "was drawn in misconception as to the previous state of the law which it was intended to amend."

In the same case the definition of partnership is considered. Partnership is described (but expressly not defined) as being at least "a contract by mutual consent of two or more persons to carry on some business and divide the profits between them in some form or other." To Kent's definition (with which that of the Indian Contract Act, adopted in this Digest as the best that has been yet given, is in substance identical, though more concise) the Master of the Rolls objects that there may be a partnership without any contribution of money, effects, labor, or skill, as in the case of a widow of a deceased partner who remains as a dormant partner in the firm. In this case the deceased partner's widow has, generally, the option of taking out his share, so that if she leaves it in the business and becomes a partner it may perhaps be considered as her contribution. But this only partially lessens the force of the general observation that "whether

or not a partner must contribute skill, labor, or money is a subsidiary, not an essential, question." This criticism might possibly be met by defining partnership as an agreement between two or more persons to share the profits of some business carried on by such persons, or any of them, *upon their common account;* these last words would give, though of course explanation would be required, the effect of the rule in *Cox* v. *Hickman.*[1]

The Master of the Rolls also expressed disapproval of the introduction of agency into the cases as a test of partnership, since the agency of a partner, being on behalf of himself as well as others, is of a peculiar kind.

Page 9. Mr. Justice Lindley (i. 37), in his comments on 28 & 29 Vict. c. 86, thinks that "the 5th section [given as Art. 7 of this Digest] does not deprive the lender of any security he may take for his money." This probably does not mean that he can call upon the Court to aid him in enforcing it, as by a foreclosure or judicial sale, but only that he may keep it and, if he can, realize it without the assistance of the Court.

[1] 8 H. L. C. 268.

In a case of *Ex parte McArthur*, 19 W. R. 821, Bacon, C. J., went so far as to compel a creditor who had a loan of this kind secured by mortgage to give up his security and join in a sale of the property for the benefit of the general body of creditors; but this is now overruled by the decision of the Court of Appeal in *Ex parte Sheil, Re Lonergan*, Feb. 22, 1877.

Page 78, Note 5. Add reference to *Alder* v. *Fouracre*, 3 Swanst. 489, for the converse case of a deceased partner's representatives acquiring the property which the deceased partner had contracted to purchase in his own name but for partnership purposes. In such case they cannot deal with the property, when acquired, except for the benefit of the firm and with the consent of its surviving members.

Page 82. Before the Judicature Acts the taking of partnership property in execution for a partner's separate debt was an inconvenient and complicated process. The sheriff could sell only the judgment debtor's interest in the goods seized, and the purchaser's title was subject to all the rights of the other partners, which could be ascertained only by a distinct suit in equity. See

Lindley, i. 708 *seq.* The matter may now be dealt with by a Judge's order made on interpleader summons at chambers. It is referred to a Master to take the partnership accounts, and all further questions are reserved till after his report. At the same time a solvent partner may (it is suggested) be appointed receiver and manager of the partnership assets, with a direction to account to the Master when required.

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